No. 88-32-CSY
Status: GRANTED

Title: Massachusetts, Petitioner
v.
Richard N. Morash

Docketed:
July 5, 1988

Court: Supreme Judicial Court
of Massachusetts

Counsel for petitioner: Laredo,Marc C.

Counsel for respondent: Berger,Jason

Entry	Date	Note	Proceedings and Orders
1	Jul 5 1988	G	Petition for writ of certiorari filed.
3	Jul 20 1988		Order extending time to file response to petition until August 22, 1988.
4	Aug 1 1988		Brief amici curiae of New York, et al. filed.
5	Aug 24 1988		DISTRIBUTED. September 26, 1988
6	Aug 27 1988	X	Brief of respondent Richard Morash in opposition filed.
7	Oct 3 1988		Petition GRANTED.
			**********
9	Nov 8 1988		Order extending time to file brief of petitioner on the merits until November 23, 1988.
10	Nov 23 1988		Brief amicus curiae of AFL-CIO filed.
11	Nov 23 1988		Brief amicus curiae of United States filed.
12	Nov 23 1988		Joint appendix filed.
13	Nov 23 1988		Brief of petitioner Massachusetts filed.
14	Nov 23 1988		Brief amici curiae of New York, et al. filed.
16	Dec 16 1988		Order extending time to file brief of respondent on the merits until January 3, 1989.
17	Jan 3 1989		Brief of respondent Richard Morash filed.
19	Jan 6 1989		SET FOR ARGUMENT TUESDAY, FEBRUARY 21, 1989. (2ND CASE.)
18	Jan 10 1989		CIRCULATED.
20	Feb 2 1989	X	Reply brief of petitioner Massachusetts filed.
21	Feb 21 1989		ARGUED.

(1)

88-32

NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
Attorney General

Marc C. Laredo*
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

QUESTION PRESENTED

Whether the ERISA preemption provision bars a state from prosecuting an employer who fails to pay an employee for unused vacation time owed pursuant to the employer's agreement to make such payments out of the employer's general assets.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Petitioner, the Commonwealth of Massachusetts, hereby petitions this Court to issue a writ of certiorari to review a ruling of the Supreme Judicial Court for the Commonwealth of Massachusetts.

OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 402 Mass. 287, 522 N.E.2d 409 (1988) and is reproduced in Appendix A.

JURISDICTION

The Opinion and Order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on May 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, et seq. (1982), provides, in pertinent part:

§ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1144(a) of ERISA provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 1144(b)(4) of ERISA provides:

> (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

The applicable United States Department of Labor regulation, codified at 29 C.F.R. §2510.3-1(b) (1987), provides:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include - . . .
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example -
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons;

Mass. Gen. Laws c. 149, §148 (1982) provides, in pertinent part:

> Every person having employees in

> his service shall pay weekly each such employee the wages earned by him . . . and any employee discharged from such employment shall be paid in full on the day of his discharge. . . . The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.
>
> The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. . . . .
>
> Whoever violates this section shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in a house of correction for not more than two months, or both.

STATEMENT OF THE CASE

On May 29, 1986, two criminal complaints were issued in the Boston Municipal Court charging Richard N. Morash ("Morash"), a bank president, with failing to pay vacation wages to two former employees in violation of Mass. Gen. Laws c. 149, §148 (1982)

(Nos. 216230, 216231; R. 3-4). On June 12, 1986, Morash was arraigned, pleaded not guilty and waived his right to a jury trial (R. 1, 2). On November 4, 1986, after several continuances, Morash filed a motion to dismiss (R. 1, 2, 5). After a November 10, 1986 court hearing, the judge took the motion under advisement (R. 1, 2).

On January 14, 1987, the trial judge reported a question of law to the Massachusetts Appeals Court pursuant to Mass. R. Crim. P. 34 (R. 10-13).[1/]

The reported question was as follows:

> The Commonwealth contends that the defendant in this case violated G.L. c. 149 §148 by failing to compensate the complainants, two former employees, for vacation time that they accrued but did not use. The defendant has filed a motion to dismiss, alleging that the Commonwealth cannot prosecute under this section because it is preempted by federal law. This motion raises an important question of law that, in my judgment, requires a decision from this Court. Therefore, I report the following question of law pursuant to Mass. R. Crim. P. 34:
>
> Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. (ERISA), preclude prosecution of an employer who has allegedly violated c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement.

1/ Under Mass. R. Crim. P. 34, a trial judge may report an important or doubtful question of law to the Massachusetts Appeals Court for decision.

The parties prepared a stipulation of facts which was reported along with the question (R. 10-11; 14-17). The stipulation of facts was as follows:

> The defendant in these cases, Richard N. Morash, ("Mr. Morash"), is the president of The Yankee Bank for Finance and Savings, F.S.B. formerly known as Home Savings Bank F.S.B. (the "Bank"). In May, 1984 the Yankee Companies, Inc. acquired the stock of Home Savings Bank, F.S.B. Home Savings Bank had been in serious financial trouble and was threatened with a regulatory merger.
>
> On May 29, 1986 Messrs. Christopher C. Winslow and William

R. Tuttle ("the complainants"), each a former vice-president of the Bank, applied for and were granted criminal complaints in the Boston Municipal Court. Mr. Winslow alleged that the Bank discharged him on May 24, 1985, and that it owes him $14,520 for 66 unused vacation days. Mr. Tuttle alleged that the Bank discharged him on May 24, 1985, and that it owes him $11,146.38 for 42 unused vacation days. The Commonwealth contends that the Bank violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants for vacation time they accrued but did not use.

The Commonwealth, through the Department of Labor and Industries (the "DLI"), is prosecuting these criminal complaints. The DLI and Mr. Morash agree that the following elements of the DLI's prima facie case are undisputed: (1) that the complainants were employed by the Bank, (2) that the Bank terminated the complainants' employment relationships with the Bank and (3) that the Bank did not offer to pay the claimants the amount of vacation time that they claim they are owed (although it did offer to pay the claimants for vacation time that they accrued after January 1, 1985).

The Question in these cases arises from Section 148's provision that where there is an oral or written agreement to compensate employees for vacation time, vacation pay constitutes wages. For the purpose

of this Question only, it is agreed that the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time. Also for the purposes of this Question only, it is agreed that such agreements stem from handbooks, manuals, memoranda and practices. It is further agreed that when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets.

On November 3, 1986 Mr. Morash moved to dismiss both complaints on the grounds that, in order for the DLI to prove a violation of Section 148, it must prove the existence of an oral or written agreement or policy to compensate employees for all unused vacation time. The Defendant's contention is that proof of such an agreement or policy would constitute proof of a welfare benefit plan, which would fall within ERISA's exclusive jurisdiction (R. 15-17).

On January 15, 1987, the case was docketed in the Massachusetts Appeals Court. On April 24, 1987, the Massachusetts Supreme Judicial Court, on its own initiative, accepted the case for direct appellate review. Mass. R. App. P. 11 (R. 12-13).

On May 5, 1988, the Massachusetts Supreme Judicial Court answered the reported question as follows:

> Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is preempted if the payments were to be made pursuant to an "employee benefit plan." Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

Commonwealth v. Morash, 402 Mass. 287, 289, 522 N.E.2d 409, 411 (1988). The Supreme Judicial Court's decision terminated the prosecution of Morash. 402 Mass. at 298, 522 N.E.2d at 416.

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve The Conflict Among Several Courts Of Appeals And States' Highest Courts Regarding Whether ERISA Preempts State Laws Pertaining To Vacation Payments Made To Employees From Employers' General Assets.

In Commonwealth v. Morash, 402 Mass.

287, 522 N.E.2d 409 (1988), the Supreme Judicial Court held that the criminal prosecution of an employer who fails to make agreed-upon vacation payments to employees is preempted by §1144(a) of ERISA. Although this decision aligns the Supreme Judicial Court with the Fourth and Sixth Circuit Courts of Appeals, which have held that ERISA preempts state laws pertaining to vacation payments to employees, it places the court in direct conflict with the Second and Ninth Circuit Courts of Appeals and the New Jersey Supreme Court, all of which have reached the opposite conclusion. Holland v. National Steel Corp., 791 F.2d 1132 (4th Cir. 1986); Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985); Shea v. Wells Fargo Armored Serv. Corp., 810 F.2d 372 (2d Cir. 1987); California Hosp. Ass'n v. Henning, 770 F.2d 856

(9th Cir. 1985), cert. denied, 477 U.S. 904 (1986); Erich v. GAF Corp., 110 N.J. 230, 540 A.2d 516 (1988). The Court's resolution of this case is necessary to resolve the disagreement among the courts.

On several occasions, this Court has considered questions concerning the scope of the ERISA preemption clause. See, e.g., Mackey v. Lanier Collection Agency, 56 U.S.L.W. 4631 (1988); Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211 (1987); Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). However, this Court has never decided the question currently dividing the lower courts; namely, whether state laws pertaining to vacation payments, paid out of an employer's general assets, are preempted by ERISA.

Most full-time employees in the United States receive paid vacation benefits. Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702 (1987); United States Chamber of Commerce, Employee Benefits 1986 (1987) at 21 (86 percent of employers in the United States offered payments for or in lieu of vacation in 1986). Compared to laws regarding severance payments, which are likely to affect relatively few employers and employees, thousands of employers and millions of employees are affected by statutes relating to vacation pay. Employee Benefits 1986 at 21. Often, employees will defer receipt of vacation payments until they terminate their employment. This arrangement may benefit employees, who receive payment for unused vacation

time, and employers, who do not have to do without a vacationing employee. Indeed, 48 states and the District of Columbia have statutes governing wage payments to employees and over half of those laws specifically apply to vacation pay either through explicit mention in the statute or by judicial interpretation. See Appendix B (compiling statutes from all fifty states and the District of Columbia).

Due to the importance of vacation benefits to both employers and employees, the lower courts have repeatedly considered and disagreed as to whether state law or ERISA governs vacation payments paid from an employer's general assets. Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702 (1987). The Fourth and Sixth

Circuit Courts of Appeals as well as the Supreme Judicial Court have concluded that vacation provisions are "employee welfare benefit plans" as that term is defined in ERISA. Blakeman, 779 F.2d at 1149; Holland, 791 F.2d at 1134-1136; Morash, 402 Mass. at 291-295, 522 N.E.2d at 412-416.

In Blakeman, the Sixth Circuit Court of Appeals concluded, with virtually no discussion, that "[t]here seems little doubt . . . that the severance pay and vacation provisions are 'employee welfare benefit plans'" and thus preempted by ERISA. 779 F.2d at 1149. In Holland, the employee claimed that her employer's failure to pay her for her unused vacation time violated a West Virginia state law. 791 F.2d at 1134. The Fourth Circuit Court of Appeals found that the employee's claim was preempted by ERISA. Id. at 1135. In

reaching this conclusion, the court expressly disregarded a regulation promulgated by the United States Department of Labor, 29 C.F.R. §2510.3-1(b) (1987), which exempts from ERISA vacation payments which employers make out of their general assets. Id.

The rulings of the Morash, Holland and Blakeman courts clash with the holdings of the Second and Ninth Circuit Courts of Appeals and the Department of Labor's regulation. In California Hosp. Ass'n v. Henning, 770 F.2d 856 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986), the court reversed the district court's ruling, held that 29 C.F.R. §2510.3-1(b) (1987) was a valid regulation, and concluded that ERISA did not preempt a state law governing payment of vacation pay. Moreover, unlike Blakeman, Holland and Morash,

Henning noted that "[i]n adopting ERISA Congress was primarily concerned with regulating private pension plans." 770 F.2d at 859.

The Henning court also observed that the side effects of including vacation payments within ERISA are substantial. Id. at 860. For example, "ERISA coverage would require compliance by each employer with numerous statutory requirements for formulating plans, establishing procedures, giving notices, and filing reports." Id. Furthermore, any employee claiming denial of vacation payments could sue his or her employer in federal court. Id. at 861. The Henning court concluded that "[i]t is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment." Id.

Morash also directly conflicts with the holding of the Second Circuit Court of Appeals in Shea v. Wells Fargo Armored Service Corp., 810 F.2d 372 (2d Cir. 1987). In Shea, a collective bargaining agreement provided that terminated employees would be paid for earned but unused vacation time accumulated during the current and preceding year. Shea, 810 F.2d at 374. The court concluded that this agreement was a "payroll practice" and, relying on 29 C.F.R. §2510.3-1(b) (1987) and Henning, held that ERISA did not govern alleged violations of the agreement. Id. at 376. Moreover, the Shea court rejected the argument subsequently adopted by the Morash court that the post-termination vacation payments

should be characterized as severance pay. Id. at 377.[2/]

The Morash decision also runs afoul of the Department of Labor regulation. 29 C.F.R. §2510.3-1(b) (1987). An agency's interpretation of a statute, embodied in a regulation which was formulated contemporaneously with the enactment of the statute, is entitled to great weight. Watt v. Alaska, 451 U.S. 259, 272-273 (1981). The regulation

---

2/ Severance payments and vacation pay are logically distinct. See, e.g., M. Miller, Comprehensive GAAP (Generally Accepted Accounting Principles) Guide 1988 §§8.16-8.19 (1987). Vacation pay is no more than a form of deferred income, whether paid when the employee takes his vacation or at the end of his employ. 87 Colum. L. Rev. at 1720; Evans v. Unemployment Insurance Appeals Board, 39 Cal.3d 398, 216 Cal. Rptr. 782, 703 P.2d 122, 130-131 (1985) (en banc) [vacation pay should not be treated as pension or severance benefit]. Thus, it is logically consistent to conclude that while severance pay is preempted in some circumstances, vacation pay out of general assets is never preempted by ERISA.

specifically exempts from ERISA vacation payments made from an employer's general assets.[3/]

Adding to the evident dissension among the lower courts is a New Jersey Supreme Court case decided five days after Morash. In Erich v. GAF Corp., 110 N.J. 230, 540 A.2d 518 (1988), the parties had stipulated that ERISA controlled the question of whether discharged employees were entitled to vacation pay. 110 N.J. at 233, 540 A.2d at 519. The court, however, rejected

---

3/ The Morash court attempted to avoid the requirements of the regulation by concluding that Henning applied only to payments made while an employee is on vacation and not money owed after termination. This conclusion, however, is not grounded in fact. In Henning, the issue was whether the state could require an employer to pay an employee for earned but unused vacation time. California Hospital Assoc. v. Henning, 569 F. Supp. 1544, 1547 (C.D. Cal. 1983). Thus, the Morash court's decision squarely conflicts with the Department of Labor's regulation.

the parties' conclusion, stating that "we agree that it is probably incorrect to assume that Congress intended that issues of vacation pay should become issues of federal law." 110 N.J. at 237, 540 A.2d at 521. It also noted that preempting state laws would probably leave vacation benefits unregulated because of the lack of federal standards in this area. 110 N.J. at 238, 540 A.2d at 522; Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. at 1710.[4/]

4/ The profound impact of the Morash court's decision was foreseen by the Seventh Circuit Court of Appeals in a case in which it declined to reach the question at issue in Morash. National Metalcrafters v. McNeil, 784 F.2d 817, 822-823 (7th Cir.), cert. denied, 107 S. Ct. 403 (1986). The Seventh Circuit Court of Appeals stated that resolving the question in favor or preemption "would subject all companies with vacation plans to the elaborate requirements that ERISA imposes on plans

(footnote continued)

Thus, there is a conflict among four Courts of Appeals and two state supreme courts regarding whether ERISA preempts state laws pertaining to vacation pay. This question affects millions of employers and employees throughout the nation. Resolution by the Court is necessary in order to resolve this important matter.

II. The Decision In Morash Is Irreconcilable With This Court's Decision In Fort Halifax Packing Co. v. Coyne.

This Court's opinion in Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987), sets forth the standards by which a lower court must determine if a state statute is preempted by ERISA. In Fort Halifax, the Court rejected the claim that ERISA forecloses virtually

---

(footnote continued)

within its scope, would broadly displace the regulation of vacation benefits by state law, and could bring a host of trivial cases into the federal courts." Id. at 823.

all state laws regarding employee benefits. Id. at 2215. Rather, this Court held that in examining a state law to determine if it is preempted by ERISA, a court must look at "the plain language of ERISA's pre-emption provision, the underlying purpose of that provision, and the overall objectives of ERISA itself." Id.

This Court noted that ERISA does not refer to state laws relating to "employee benefits" but only to "employee benefit plans." Id. (emphasis in original). It concluded that the one-time severance payment called for in the state statute did not constitute a "plan" under ERISA because the law did not regulate a benefit program or call for complex administrative obligations. Id. at 2221.

The decision in Morash is irreconcilable with this Court's holding

in Fort Halifax. The Massachusetts criminal statute neither requires an employer to establish a program for deferred vacation pay nor regulates the administration of any such program. Like in Fort Halifax, payment is to be made from a company's general assets. The Maine statute required an employer to calculate the number of years an employee had worked and to pay him one week's wages for each year; under the agreement in Morash, the employer simply adds up the employee's unused vacation days and writes a check.

Nevertheless, the Morash court concluded that because the employer periodically had to add up vacation days and perhaps make future payments, a plan had been established. The Commonwealth submits that there is no logical distinction between calculating the

number of years worked and the number of vacation days earned but not taken. Furthermore, under the Massachusetts agreement, the employer, like the employer in Maine, did not assume responsibility to pay benefits on a regular basis. Rather, unused vacation pay is due only when an employee leaves his employment and only if he or she has unused vacation days. Morash, 402 Mass. at 289, 522 N.E.2d at 411. As this Court succinctly stated in Fort Halifax, "[t]o do little more than write a check hardly constitutes the operation of a benefit plan." Fort Halifax, 107 S. Ct. 2218. The Morash decision cannot be reconciled with this Court's ruling in Fort Halifax.

III. The Court Should Resolve The Confusion In The Lower Courts Regarding The Meaning Of "Generally Applicable Criminal Law" In ERISA.

Section 1144(b)(4) of ERISA provides that the preemption clause, §1144(a), shall not apply to "any generally applicable criminal law of a State." 29 U.S.C. §1144(b)(4) (1982). The question of what constitutes a "generally applicable criminal law" has resulted in great confusion among the lower courts. This Court should resolve that confusion.

The Supreme Judicial Court, relying upon its previous pronouncement in Commonwealth v. Federico, 383 Mass. 485, 419 N.E.2d 1374 (1981), ruled that because Mass. Gen. Laws c. 149, §148 is "limited to the non-payment of 'wages' by an employer to an employee, including agreed-upon vacation payments which will often be funded from 'employee benefit plans,' prosecution under the statute is

not saved from preemption by the exception for 'generally applicable criminal laws.'" 402 Mass. at 297, 522 N.E.2d at 415. The petitioner submits that this conclusion is incorrect.

Thirty-four states and the District of Columbia have statutes imposing criminal penalties on employers who fail to pay wages to employees. See Appendix B. These statutes, unlike laws aimed at pension plans, apply to every employer, from a sole proprietor to the president of a multinational corporation.

There is no doubt that certain state criminal laws are not preempted. Even the Supreme Judicial Court acknowledges that the exception applies to "criminal laws that are intended to apply to conduct generally - criminal laws against larceny and embezzlement, for example." Commonwealth v. Federico, 383

Mass. 485, 490, 419 N.E.2d 1374, 1377 (1981).

While there is general agreement on the outer limit of the exception, the lower courts are divided on the question of exactly what is meant by "generally applicable criminal law." For example, in Upholsterers' Int'l Union v. Pontiac Furniture, Inc., 647 F. Supp. 1053, 1056 (C.D. Ill. 1986), the court concluded that the Illinois Wage Payment and Collection Act was a generally applicable criminal law and so not preempted. In contrast, the court in People v. Art Steel Co., Inc., 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986), held that a New York statute making it a criminal offense to fail to pay wage benefits was preempted. The Art Steel court's conclusion flatly contradicts a previous interpretation of the same

statute. Goldstein v. Mangano, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1968). The cases cited in Morash are further evidence of this confusion. 402 Mass. at 297, 522 N.E.2d at 415. This Court's resolution of the issue will provide much-needed guidance to the lower courts.

CONCLUSION

For the above-stated reasons, this Court should grant the petition and review and reverse the decision of the Supreme Judicial Court.

Respectfully submitted,

JAMES M. SHANNON
Attorney General

Marc C. Laredo
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Date: July 1, 1988

APPENDIX A

COMMONWEALTH vs. RICHARD N. MORASH

Suffolk
January 4, 1988 - May 5, 1988

PRESENT: WILKINS, ABRAMS, NOLAN, LYNCH, & O'CONNOR, JJ.

Jurisdiction, Federal preemption. Statute, Federal preemption. Employee Retirement Income Security Act. Labor, Wages, Failure to pay wages. Employment, Termination. Contract, Employment. Words, "Employee benefit plan."

In answer to a reported question this court held that a prosecution under G.L. c. 149, §148, of an officer of a corporate employer which failed to pay agreed-upon vacation benefits to discharged employees was preempted by §1144(a) of Title 29 U.S.C., the Employee Retirement Income Security Act of 1974 (1982). [288-289]

In answering a reported question arising from the prosecution under G.L.

c. 149, §148, of a bank officer for failure to make prompt payment of wages to discharged employees of the bank, this court held that, on the facts as stipulated, the bank's policy of giving its employees a lump-sum cash payment for accrued unused vacation time, upon the termination of their employment, was an "employee welfare benefit plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002(3) (1982). [291-293]

General Laws c. 149, §148, which provides criminal penalties for failure to make prompt payment of wages to discharged employees, as applied to a certain employer's nonpayment of vacation benefits owed to discharged employees in accordance with an employee benefit plan, was held to "relate to" that employee benefit plan within the

meaning of the preemption provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a) (1982). [293-295]

General Laws c. 149, §148, as applied to an employer's nonpayment of vacation benefits owed to discharged employees pursuant to an employee benefit plan, was held to "regulate" the terms and conditions of that employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(c)(2) (1982), inasmuch as it provided criminal penalties in order to obtain employers' compliance with the terms and conditions of that plan. [295-296]

General Laws c. 149, §148, which provides criminal penalties for an employer' nonpayment of wages to employees, including nonpayment of

vacation benefits due under an employee benefit plan was held not to be a "generally applicable criminal law," exempt pursuant to 29 U.S.C. §1144(b)(4), from preemption by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1145 (1982). [296-297]

COMPLAINTS received and sworn to in the Boston Municipal Court Department on May 29, 1986.

A question of law was reported to the Appeals Court by John A. Pino, J. The Supreme Judicial Court transferred the case on its own initiative.

Jason Berger (Marcia E. Greenberg with him) for the defendant.

Marc C. Laredo, Assistant Attorney General, for the Commonwealth.

O'CONNOR, J. The defendant is charged in two complaints with

violating G.L. c. 149, §148 (1986 ed.). Section 148 requires an employer to make prompt payment of wages owing to employees who have been discharged. Wages include "any holiday or vacation payments due an employee under an oral or written agreement." Section 148 also provides that the president of a corporation, among others, shall be deemed to be the employer of the corporation's employees. The Commonwealth contends that the defendant bank president failed to compensate two discharged vice presidents for vacation time they accrued but did not use.

The defendant moved for dismissal of the complaints, arguing that, in order to prove its case, the Commonwealth would have to establish that the defendant failed to honor an "employee welfare benefit plan" as that term is

used in the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1145 (1982) (ERISA). Prosecution for not honoring such a plan, the defendant argued, and argues on appeal, is preempted by ERISA. No action was taken on the motion to dismiss. Instead, a judge of the Boston Municipal Court reported the following question to the Appeals Court: "Does the preemption provision, section 1144(a) of . . . [ERISA] preclude prosecution of an employer who has allegedly violated G.L. c. 149, §148, by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement?" We answer the reported question as follows: "Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is

preempted if the payments were to be made pursuant to an 'employee benefit plan.'" Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

For the purpose of obtaining an answer to the reported question, the parties have stipulated as follows: The defendant is the president of The Yankee Bank for Finance and Savings, formerly known as Home Savings Bank (bank). In May, 1984, the Yankee Companies, Inc., acquired the stock of the bank, which had been in severe financial trouble. On May 29, 1986, two former bank vice presidents, Christopher C. Winslow and William R. Tuttle, were granted the

complaints referred to above. Winslow claimed that he had been discharged on May 24, 1985, and that the bank owed him $14,520 for sixty-six unused vacation days. Tuttle claimed that he had been discharged on April 19, 1985, and that he was owed $11,146.38 for forty-two unused vacation days.

The parties also have stipulated, consistently with Winslow's and Tuttle's claims when they applied for the criminal complaints, that Winslow and Tuttle had been employees of the bank, that they had been discharged, and that, although the bank offered to pay them for vacation time they had accrued after January 1, 1985, the bank had not offered to pay them for the vacation time they claimed to have accrued before that date. The parties further stipulated, for the purpose of obtaining an answer to the reported question, that

the bank had made oral "and/or" written agreements stemming from handbooks, manuals, memoranda, and practices to pay employees in lieu of unused vacation time, and that, "when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets." Lastly, the parties agree on appeal that, pursuant to bank policy, employees who accrue unused vacation time receive a lump-sum cash payment in lieu of the unused time upon termination of their employment.

The ERISA preemption provision, 29 U.S.C. §1144(a), provides that "[e]xcept as provided in subsection (b) of this section, the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

described in section 1003(a)." Section 1003(a) does not define "employee benefit plan." It merely describes the employee benefit plans to which ERISA applies. To the extent material here, §1003(a) provides that ERISA "shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce . . . . "

Section 1002(3) defines "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan . . . ." There is no contention in this case that the bank's agreement to pay discharged employees for accrued but unused vacation time constituted an employee pension benefit plan. Rather, the defendant contends that the bank's

agreement constituted an employee welfare benefit plan. Section 1002(1) defines "employee welfare benefit plan" as "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants . . . vacation benefits . . . ." The statute does not define the words "fund" or "program," or further define the word "plan."

In Barry v. Lymo Graphic Syss., Inc., 394 Mass. 830 (1985), former employees sued the defendant to recover severance pay and vacation pay. Their action was based on booklets, manuals, a memorandum, and company practices. Id. at 832-833. We held that the plaintiffs' claims were preempted by ERISA. We concluded that neither a

formal, written plan nor a separate fund is a prerequisite to the establishment or maintenance of an ERISA employee benefit plan. We concluded that a Department of Labor regulation, 29 C.F.R. §2510.3-1(b)(3), which provides that payments of compensation out of an employer's general assets while an employee is on vacation are not made pursuant to an employee welfare benefit plan, was not controlling. Barry, supra at 837. Relying on California Hosp. Ass'n v. Henning, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983), rev'd subsequent to our decision in Barry, 770 F.2d 856 (9th Cir. 1985), modified, 783 F.2d 946 (9th Cir.), cert. denied, 477 U.S. 904 (1986), we interpreted the Department of Labor regulation as applying only to an employer's discretionary practices and not to those contractually required. Barry, supra at 837-839, and 837 n.7.

We need not decide now, whether, in light of the Ninth Circuit Court of Appeals' reversal of the District Court decision in California Hosp. Ass'n, supra, we should modify our interpretation of the Department of Labor regulation, because, in any event, the applicable portion of that regulation deals only with an employer's payments of compensation out of general assets to an employee while he or she is on vacation, see California Hosp. Ass'n v. Henning, 770 F.2d at 858, and does not apply to the present case which involves a lump-sum payment for unused vacation time upon discharge. Such payments are more akin to severance pay than to ordinary wages. See Scott v. Gulf Oil Corp., 754 F.2d 1499, 1503 (9th Cir. 1985).

Relying heavily on Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211

(1987), the Commonwealth argues that Barry v. Dymo Graphics Syss., Inc., supra, should not control the result in the present case. Fort Halifax Packing Co. was a civil action to recover severance pay due under a statute of the State of Maine. The statute required a one-time severance payment to employees in the event of a plant closing. The Supreme Court held that ERISA did not preempt the action, reasoning that the Maine statute "neither establishes, nor requires an employer to maintain, an employee welfare benefit 'plan' . . ." Id. at 2215.

Despite its holding, the Supreme Court's rationale in Fort Halifax Packing Co. supports rather than negates preemption in this case. The Court focused in that case on Congress's purpose in providing ERISA preemption:

"An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States . . . . A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program

operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." Id. at 2216-2217.

In Fort Halifax Packing Co., the Court based its conclusion that the Maine statute neither establishes nor requires an employer to maintain an employee benefit plan on the fact that "[t]he requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that

create a need for financial coordination and control. . . . The employer may well never have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. . . . The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits." Id. at 2218. (Emphasis in original.)

There is a significant difference between Fort Halifax Packing Co. and the instant case, and that difference demonstrates why the purposes of the ERISA preemption provisions would not

have been served in that case but are served in this case by a holding that ERISA preempts application of the local statute. Here, the bank's assumption of the responsibility to pay stored-up vacation benefits to terminated employees necessitated correct computation on the basis of accurate records, and a periodic demand for adequate funds to meet commitments was foreseeable. An administrative scheme for dealing with those requirements without potentially conflicting or otherwise burdensome multi-State regulations is to be encouraged.

The significance of the factual distinction between Fort Halifax Packing Co. and this case is demonstrated by the discussion in the Fort Halifax case of the cases of Holland v. Burlington Indus., 772 F.2d 1140 (4th Cir. 1985),

summarily aff'd sub nom. Brooks v. Burlington Indus., 477 U.S. 901, cert. denied sub nom. Slack v. Burlington Indus., 477 U.S. 903 (1986), and Gilbert v. Burlington Indus., 765 F.2d 320 (2d Cir. 1985), summarily aff'd, 477 U.S. 901 (1986). The Court in Fort Halifax Packing Co., supra at 2220, characterized its holding that there was no ERISA "plan" as "completely consistent" with its holding in the Burlington Indus. cases that "a plan that pays severance benefits out of general assets is an ERISA plan." There was a "plan" in the Burlington Indus. cases, the Fort Halifax Court said, because "[t]he employer had made a commitment to pay severance benefits to employees as each person left employment. This commitment created the need for an administrative scheme to pay

these benefits on an ongoing basis . . . ." Id. at 2221 n.10. We conclude that a company policy providing for payments to employees upon discharge of unused vacation time, which policy is detailed in company handbooks, manuals, memoranda, and practices, as here, is an employee welfare benefit plan within ERISA.

Our conclusion that the bank's commitment constituted an ERISA "plan" does not end our inquiry. Section 1144(a) of 29 U.S.C. provides for preemption of State laws only in so far as they "relate to" employee benefit plans. The Commonwealth contends that, even if we are dealing here with an employee benefit plan, G.L. c. 149, §148, does not "relate to" such a plan. We disagree. The Supreme Court has stressed that "the words 'relate to' should be construed expansively: '[a]

law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" Fort Halifax Packing Co., supra at 2215, quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 1553 (1987). Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985). For ERISA to preempt a State law, therefore, it is not necessary that the State law be specifically designed to affect employee benefit plans, Pilot Life Ins. Co. v. Dedeaux, supra at 1553, nor is it necessary for preemption that the State law be in conflict with the substantive requirements of ERISA. Metropolitan Life Ins. Co. v. Massachusetts, supra at 739. Commonwealth v. Federico, 383 Mass. 485, 488 (1981).

It is true that a State law may affect an employee benefit plan in "too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw v. Delta Air Lines, Inc., supra at 100 n.21. See Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550, 552-556 (6th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1465-1468 (5th Cir. 1986), cert. denied, 107 S. Ct. 884 & 1298 (1987). The Commonwealth argues that a criminal prosecution under G.L. c. 149, §148, "punishes employers for engaging in prohibited acts; it does not 'relate to' an ERISA plan itself" and therefore any connection between the statute and the bank's plan is too tenuous, remote, and peripheral to justify preemption. However, we are

satisfied that a statute that applies to nonpayment of vacation benefits upon termination of employment pursuant to an employee benefit plan, as c. 149, §148, does, "relate to" that plan. In such a case, the statute as applied represents an attempt by the State to enforce the provisions of the plan. State laws that attempt to enforce benefit plans are preempted. See Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1356 (9th Cir. 1986), modified, 791 F.2d 799 (9th Cir.), cert. denied, 107 S. Ct. 435 & 670 (1986). The fact that G.L. c. 149, §148, also applies to wages and agreed-upon vacation benefits that may not arise under an "employee benefit plan" is irrelevant to the "relate to" analysis, which focuses on the effect of the statute as applied in a particular case. "It would have been unnecessary

to exempt generally applicable state criminal statutes from pre-emption in [§1144](b), for example, if [§1144](a) applied only to state laws dealing specifically with ERISA plans." Shaw v. Delta Air Lines, Inc., supra at 98. Thus, although every prosecution under G.L. c. 149, §148, is not preempted, see Shaw, supra at 97 n.17, this one is. Our conclusion finds support in Commonwealth v. Federico, supra, where we held that a criminal prosecution under G.L. c. 151D, §11, penalizing, among other things, delinquent contributions to employee benefit plans, is preempted by ERISA.

The Commonwealth further argues that, even if G.L. c. 149, §148, as applied, "relates to" an employee benefit plan, it still is not preempted because it does not "purport to

regulate, directly or indirectly, the terms and conditions of employee benefit plans." The genesis of this "purport to regulate" test is the definition of "State" in 29 U.S.C. §1144(c)(2). "State" is there defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." The Commonwealth asserts that the "purport to regulate" test is narrower than the "relate to" test, citing Martori Bros., supra at 1359. But see Holland, supra at 1147-1148 ("[g]iven the explicitly broad nature of ERISA preemption, we are not inclined to limit ERISA's coverage through a restrictive reading of this term"); Authier v. Ginsberg, 757 F.2d 796, 799

n.4 (6th Cir.), cert. denied, 474 U.S. 888 (1985).

In any case, we believe that the State criminal statute, as applied in this case, would meet the "purport to regulate" test, as well as the "relate to" test. "It is axiomatic . . . [that] the power to regulate includes the power to enforce. Here the state is attempting directly to regulate the terms and conditions of a [welfare benefit] plan by using its criminal law to obtain compliance with those terms and conditions." (Citation omitted.) Cairy v. Superior Court, 192 Cal. App. 3d 840, 843 (1987).

Finally, the Commonwealth argues that this prosecution is not preempted because of 29 U.S.C. §1144(b)(4), which provides that no "generally applicable criminal law of a State" shall be

preempted. In Commonwealth v. Federico, supra, we decided that a prosecution under G.L. c. 151D, §11, was preempted in spite of the exception for any "generally applicable criminal law." In holding that the statutory exemption did not apply, we said: "The §1144(b)(4) exception from preemption for 'generally applicable' State criminal laws appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity 'relates to' an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally - criminal laws against larceny and embezzlement, for example. By virtue of §1144(b)(4), a State is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who

steals money from an employee benefit plan, simply because the theft involved such a plan. But by limiting the §1144(b)(4) exception to criminal laws of general applicability, Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans" (emphasis in original). Id. at 490.

The Commonwealth emphasizes the statement in Federico that "Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans" (emphasis added). Id. Unlike G.L. c. 151D, §11, argues the Commonwealth, G.L. c. 149, §148, is not specifically aimed at employee benefit plans, but rather is a nonpayment of wages statute.

The defendant, on the other hand, emphasizes the statement that "[t]he

exception seems directed toward criminal laws that are intended to apply to conduct generally criminal laws against larceny and embezzlement, for example." Federico, supra. The exception, he argues, applies to laws such as those prohibiting larceny and embezzlement, which apply to all persons in any context, and not to criminal laws limited to the employer-employee relationship, and specifically aimed at requiring the payment of employee compensation.

Federico has been widely followed on the issue of what constitutes a "generally applicable criminal law." See Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1495 (D. Conn. 1986); Baker v. Caravan Moving Corp., 671 F. Supp. 337, 341-342 (N.D. Ill. 1983); Trustees of Sheet

Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 563 (E.D.N.Y. 1983); Cairy v. Superior Court, 192 Cal. App. 3d 840, 843-844 (1987); State v. Burten, 219 N.J. Super. 339, 346-351 (N.J. Super. Ct. Law Div. 1986), aff'd, 219 N.J. Super. 156 (App. Div. 1987); People v. Art Steel Co., 133 Misc. 2d 1001, 1007-1009 (N.Y. Crim. Ct. 1986). See also Calhoon v. Bonnabel, 560 F. Supp. 101, 108-109 (S.D.N.Y. 1982) (criticizing Goldstein v. Mangano, 99 Misc. 2d 523, 532 [N.Y. Civ. Ct. 1978], result disagreed with in Federico, supra at 490). Cf. Blue Cross & Blue Shield v. Peacock's Apothecary, Inc., 567 F. Supp. 1256, 1276 (N.D.Ala. 1983) (law aimed primarily at pharmacists not "generally applicable"). But see

Upholsterer's Int'l Union v. Pont[illegible] Furniture, Inc., 647 F. Supp. 1053, 1056 (C.D. Ill. 1986); National Metalcrafters v. McNeil, 602 F. Supp. 232, 237 (N.D. Ill. 1985), rev'd on other grounds, 784 F.2d 817 (7th Cir.), cert. denied, 107 S. Ct. 403 (1986).

Although we agree with the Commonwealth that G.L. c. 151B, §11, the statute we held to be preempted in Federico, is aimed more specifically at employee benefit plans than G.L. c. 149, §148, we conclude that G.L. c. 149, §148, is not so general as to fall within the exception to preemption provision provided by Congress. Because our statute is limited to the nonpayment of "wages" by an employer to an employee, including agreed-upon vacation payments which will often be funded from "employee benefit plans," prosecution

under the statute is not saved from preemption by the exception for "generally applicable criminal laws."

We therefore answer the reported question, "Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is preempted if the payments were to be made pursuant to an 'employee benefit plan.'" Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

APPENDIX B

STATUTE(S)	COVERS VACATION PAY[1]	CRIMINAL PENALTIES[2]
Alabama - no statute	-	-
Alaska Stat. §§23.05.140 to .10.145 (1984)	?	Yes
Ariz. Rev. Stat. Ann. §§23-350,-351 (1983)	Yes	Yes
Ark. Stat. Ann. §11-4-401 (1967)	No	Yes
Cal. Lab. Code. §227.3 (1988)	Yes	No
Col. Rev. Stat. §§8-4-101 to -109 (1986)	Yes	No
Conn. Gen. Stat. §§31-71a to -71g (1958 and Supp. 1988)	Yes	Yes
Del. Code Ann. tit. 19, §§1101-1112 (1985)	Yes	Yes
D.C. Code Ann. §36-101 to -110 (1981)	.	Yes
Florida - no statute	-	-
Ga. Code Ann. §§66-101 to 9901 (1978)	?	Yes

Hawaii Rev. Stat. §§386-1 to -11 (1985)	.	Yes
Idaho Code §§45-601 to -615 (Supp. 1988)	.	No
Ill. Rev. Stat. ch. 48, §§39m-2 to -14 (1987)	Yes	Yes
Ind. Code §§22-2-9-1 to -5 (1986)	Yes	No
Iowa Code §§91A.2 to .4 (1986)	Yes	No
Kan. Stat. Ann. §§44-313 to -315 (1988)	Yes	No
Ky. Rev. Stat. §§337.010, .055 (1983 and Supp. 1986)	Yes	No
La. Rev. Stat. §631 (1965 and Supp. 1988)	Yes	No
Me. Rev. Stat. Ann. tit. 26, §§621-626 (1974 and Supp. 1986)	Yes	Yes
Md. Code Ann. art. 100, §94 (1985)	Yes	Yes
Mass. Gen. Laws c. 149, §148 (1982)	Yes	Yes
Mich. Comp. Laws §§408.471 to .475 (1985)	Yes	Yes
Minn. Stat. Ann. §181.74 (1986)	Yes	Yes

Miss. Code Ann. §§71-1-35 to -53 (1972)	.	Yes
Mo. Rev. Stat. §§290.080 to 290.110 (1986)	No	Yes
Mont. Code Ann. §§3-201 to -206 (1987)	.	Yes
Neb. Rev. Stat. §48-1229 (1984)	Yes	No
Nev. Rev. Stat. §§608.005 to .190 (1987)	.	Yes
N.H. Rev. Stat. Ann. §275.43 to .52 (1987)	Yes	Yes
N.J. Rev. Stat. §34:11-4.1 to 4.11 (1988)	.	Yes
N.M. Stat. Ann. §§50-4-1 to -12 (1978)	.	Yes
N.Y. Lab. Law §198-C (McKinney 1988)	Yes	Yes
N.C. Gen. Stat. §§95-25.2, .12 (1985)	Yes	No
N.D. Cent. Code 34-14-01 to -07 (1980)	.	Yes
Ohio Rev. Code Ann. tit. 41, §4113.15 (Baldwin 1982)	Yes	No
Okla. Stat. tit. 40, §§165.1 to .8 (Supp. 1987)	Yes	Yes
Ore. Rev. Stat. §§652.110 to .405 (1987)	.	No

Pa. Stat. Ann. tit. 43, §§260.2a, .3, .11a (Purdon Supp. 1986)	Yes	Yes
R.I. Gen. Laws §§28-14-1 to -17 (1986)	[illegible]	Yes
S.C. Code Ann. §§41-10-10, to -80 (Supp. 1987)	Yes	No
S.D. Codified Laws Ann. §§60-11-9 to -15 (1978)	No	Yes
Tenn. Code Ann. §§50-2-103 (1983)	[illegible]	Yes
Tex. Rev. Civ. Stat. Ann. art. 5155, 5157 (Vernon 1987)	[illegible]	Yes
Utah Code Ann. §§34-28-2 to -12 (1988)	[illegible]	Yes
Vt. Stat. Ann. tit. 21, §§341-345 (1987)	Yes	Yes
Va. Code §40.1-29 (1986)	[illegible]	Yes
Wash. Rev. Code §§49.48.010, .020 (Supp. 1988)	[illegible]	Yes
W.Va. Code §§21-5-1, -4 (1985 and Supp. 1986)	Yes	No

Wisc. Stat. §§109.01 to .11 (1988)	Yes	Yes
Wyo. Stat. §§27-4-101 to -105 (1977)	No	Yes

1/ In a number of instances, a state statute does not define wages and no cases have interpreted the term. For those states, the Commonwealth has used "?" rather than "Yes" or "No" in regard to whether the statute covers vacation pay.

2/ Some states impose criminal penalties for failure to pay wages but either have not defined "wages" or do not include vacation pay within that term.

(3)

No. 88-32

In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

JASON BERGER*
MARCIA E. GREENBERG
TESTA, HURWITZ & THIBEAULT
Exchange Place
53 State Street
Boston, MA 02109
(617) 367-7500

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

(1) Is the *Morash* decision, which addresses ERISA's application to an employee benefit plan dealing with pay upon termination for accrued, unused vacation time, factually distinguishable or in legal conflict with other court decisions dealing with ERISA preemption of state vacation pay claims?

(2) Is there any conflict between the *Morash* decision, that found that ERISA preempts a Massachusetts statute to the extent that it requires employer compliance with employer-sponsored vacation pay plans, and this Court's *Fort Halifax* decision, that found that ERISA does not preempt a Maine statute because it requires that employers make one-time severance payments in the case of plant-closings and therefore does not implicate employer-sponsored severance plans?

(3) Is there confusion among the lower courts about which state laws are "generally applicable criminal laws" excepted from ERISA's preemptive coverage?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 88-32

In The

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF IN OPPOSITION

Respondent Richard N. Morash ("Morash") hereby opposes the issuance of a writ of certiorari to review the instant ruling of the Supreme Judicial Court of the Commonwealth of Massachusetts.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Since the Commonwealth has set forth the relevant provisions of law in its Petition, Respondent shall not re-state them in full. For convenience, however, Respondent re-states the most essential portions:

ERISA:

29 U.S.C. § 1144(a). Effect on Other Laws:

> . . . the provisions of this title . . . *shall supercede* any and all state laws insofar as they may now or hereafter *relate to any employee benefit plan* . . . (emphasis added)

29 U.S.C. § 1002. Definitions:

> For purposes of this subchapter:
>
> (1) The terms *"employee welfare benefit plan"* and "welfare plan" mean any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries . . . *vacation benefits* . . . (emphasis added)

Department of Labor Regulation:

29 C.F.R. § 2510.3-1(b)(1987):

> (b) *Payroll practices.*
>
> . . . the terms *"employee welfare benefit plan"* and "welfare plan" *shall not include*—
>
> . . .
>
> (3) Payment of compensation, out of the employer's general assets, *on account of periods of time during which the employee,* although physically and mentally able to perform his or her duties and not absent for medical reasons . . . *performs no duties;* for example—
>
> (i) Payment of compensation *while an employee is on vacation* or absent on a holiday . . . (emphasis added)

Massachusetts Nonpayment of Wages Statute:

General Laws Chapter 149, § 148 (1982):

> . . . The word "wages" shall include any holiday or *vacation payments* due an employee *under an oral or written agreement.* (emphasis added)

———o———

STATEMENT OF THE CASE

The facts and developments in this case are simple and limited. Respondent was President of a bank that terminated the employment of two vice-presidents. Upon termination, the vice-presidents claimed the bank had agreed to reimburse them for 66 and 42 unused vacation days, respectively, which amounted to payments of approximately $14,500 and $11,000. (R. 15) The bank took issue with the amount of such claims; and the vice-presidents filed claims with the Massachusetts Department of Labor and Industries (hereinafter the "Commonwealth") under the Massachusetts Nonpayment of Wages Statute, G.L. c.149, § 148 (the "Wages Statute").[1] (R. 3, 4, 16) The vacation pay claims fell within the ambit of the Wages Statute because it states that the word "wages" includes "va-

1. Each vice-president also filed a civil action soon after filing a claim with the Commonwealth, and each Complaint includes an ERISA count claiming these same vacation benefits.

cation payments due an employee *under an oral or written agreement.*'' (R. 16) As a result of the vice-presidents' claims that an agreement existed, the Commonwealth initiated criminal proceedings against Morash. (R. 15)

Morash moved to dismiss the complaints on the ground that ERISA preempts application of the Wages Statute to oral and written agreements dealing with payment at termination for accrued, unused vacation time. (R. 5-8) Because of the import of the issue presented by the motion, the parties suggested to the trial court that it report the question of law to the Massachusetts Court of Appeals.[2] (R. 10, 11) To report the question of law, the parties stipulated that

> the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time.

(R. 16)

The question reported was whether ERISA precludes prosecution of an employer for not "compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement." (R. 12-13) The Massachusetts Supreme Judicial Court answered the question by finding that the agreement to which the parties stipulated was a plan and that, since an "employee benefit plan" was involved, prosecution under the Massachusetts Wages Statute was preempted. (Pet. at A-6, 7)

The Commonwealth implies in its Petition that the *Morash* decision holds that ERISA preempts *all* state

2. Recognizing that the issue was likely to reach it eventually anyway, the Massachusetts Supreme Judicial Court accepted the case *sua sponte* for its direct review.

wages statutes and their application to *all* sorts of vacation payments, including payments for vacation time taken during employment. (Pet. at 11, 12, 22) Clearly, however, the issue that was before the Supreme Judicial Court was not that broad. Nor, therefore, did the *Morash* court address that issue.[3] The *Morash* decision's holding is simple and narrow. If an employer provides a particular lump-sum vacation benefit to its employees pursuant to an employee benefit plan, it is ERISA rather than the Massachusetts Wages Statute that ensures an employer's compliance with its plan.

—o—

ARGUMENT

I. BECAUSE THOSE DECISIONS THAT PETITIONER CLAIMS CONFLICT WITH MORASH ARE FACTUALLY DISTINGUISHABLE AND LEGALLY CONSISTENT, THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE.

A. The Vacation Benefits In The Cases Cited by Petitioner Are Factually Distinguishable.

Petitioner contends that because the *Morash* court and the Courts of Appeal for the Fourth and Sixth Circuits have held that ERISA preempts certain state law claims

3. The court stated the limits of its holding clearly: "[T]he statute *as applied* represents an attempt by the State to enforce the provisions of the plan . . . The fact that [the Wages Statute] also applies to wages and agreed-upon benefits that may *not* arise under an 'employee benefit plan' is irrelevant to the 'relate to' analysis, which focuses on the effect of the statute as applied in a particular case." (emphasis added) (Pet. at A-23)

regarding vacation benefits, while the Courts of Appeal for the Second and Ninth Circuits have found that ERISA does not preempt other state claims, there is a legal conflict that requires resolution by this Court.[4] Respondent replies that whether ERISA preempts a particular vacation benefit claim depends upon each case's facts. Because the preemption decisions in the cited cases stem from different facts, the cases do not conflict.

In fact, the legal principles that the courts have applied have been consistent: (1) ERISA preempts state laws that relate to employee benefit plans, 29 U.S.C. § 1144 (a), (2) vacation benefits are among the benefits that employee benefit plans may provide, 29 U.S.C. § 1002(1), and (3) although ERISA applies to vacation benefit compensation paid pursuant to employee benefit plans, it does not extend to vacation benefits that are wage compensation paid pursuant to payroll practices, 29 C.F.R. § 2510.3-1(b).

Therefore, whether ERISA preempts a particular vacation benefits claim depends on a factual analysis of whether the employer provides those benefits as a routine payroll practice, or provides those benefits as compensation pursuant to a plan. The differences among preemption determinations have stemmed from whether a court has found that the facts before it constituted an employee benefit plan, not from application of different legal principles.

4. There is some ambiguity in the Commonwealth's Petition. The Commonwealth has stated that the cases finding preemption "held that ERISA preempts *state laws pertaining to vacation payments to employees.*" (Pet. at 11) Upon first reading, therefore, the Commonwealth seems to claim that whereas some courts have held that ERISA preempts all state laws regarding vacation, others have held the opposite. In fact, however, in each case the court ruled that ERISA preempts *certain* claims, not that ERISA generally preempts any and all state laws pertaining to vacation payments. See discussion, *infra*, pp. 5-11.

Petitioner has cited three cases holding that ERISA preempted certain vacation pay claims, *Commonwealth v. Morash,* 402 Mass. 287, 522 N.E.2d 409 (1988); *Blakeman v. Mead Containers,* 779 F.2d 1146 (6th Cir. 1985); and *Holland v. National Steel Corp.,* 791 F.2d 1132 (4th Cir. 1986). In each of those cases, the determinative factor was that the particular vacation benefits at issue arose from or constituted an employee benefit plan.

For example, in *Morash,* the vacation benefits at issue were *not,* as the Commonwealth implies, *all* "agreed-upon vacation payments." (Pet. at 11) The only vacation benefits *Morash* addressed were an employer's agreement to permit its employees to bank their unused vacation time until severance of the employment relationship, at which time they might cash-in their saved time at their current wage-rates. (Pet. at A-8, 9) The court ruled that ERISA preempted the vacation claims because the facts established an employee benefit plan and the Wages Statute as applied related to that plan. (Pet. at A-20, 23) Although Petitioner often refers to vacation payments generally, which might include claims for isolated vacation days taken in the course of employment or for benefits absent a plan, *Morash* addressed only reimbursement for accrued, unused vacation payments under a plan. *See supra* n. 3.

Similarly, the vacation benefits in *Blakeman* were provided by a plan. The *Blakeman* plaintiffs alleged that their employer had a written vacation pay plan for all salaried employees. *Blakeman v. Mead Containers,* 779 F.2d 1146, 1148 (6th Cir. 1985). Consequently, the court found there was "little doubt that plaintiffs [were] both participants and beneficiaries and that the vacation provisions [were] employee welfare benefit plans." *Id.* at 1149. Having made the factual determination that entitlement to the vacation benefits arose from an employee benefit plan, the court held that ERISA applied. *Id.* at 1151.

The vacation benefits in *Holland* also stemmed from a plan. The plaintiff in *Holland* alleged she was entitled to vacation payments because her employer had an extended vacation plan that provided two weeks of additional vacation to long-term employees and payment for unused extended vacation time to terminated employees. *Holland v. National Steel Corp.,* 791 F.2d 1132, 1134 (4th Cir. 1986). The district court held that ERISA preempted plaintiff's contract claim for those benefits "because such benefits are part of an employee welfare benefit plan." *Id.* at 1135. The Court of Appeals for the Fourth Circuit held that the meaning of § 1002(1) defining employee welfare benefit plans is "quite plain" and does not exempt plaintiff's employer's vacation plan. *Id.*

In contrast, the cases that Petitioner claims clash with *Morash* involve vacation payments that are factually distinguishable. In *Shea v. Wells Fargo Armored Services Corp.,* 810 F.2d 372, 374 (2d Cir. 1987), employees claimed that

> [i]n lieu of using vacation time during the year in which it was earned, employees were allowed either to carry all or some of it over to the following year, or with the employer's approval, the employee could forego all or some vacation and be paid for it.

In *Shea,* therefore, the vacation benefit was an entitlement either to take vacation time or to take payment in lieu of the time *throughout the course of employment,* as opposed to reimbursement upon termination. The issue before the Court of Appeals was the district court's determination that the employer's provisions for vacation wages did not "establish an employee welfare benefit plan subject to ERISA coverage." *Id.* at 375. In resolving the issue, the court recognized that certain enumerated payroll practices are excluded from classification as employee welfare benefit plans and found that "the wages in question are payroll practices excluded from ERISA coverage." *Id.* at 376. Moreover, the court noted,

> The vacation pay available . . . was not contingent upon termination of employment or severance; to the contrary, accumulated vacation wages were payable whether or not employment continued.

Id. at 377. Based on its determination that the vacation payment facts presented a payroll practice rather than an employee benefit plan, the court found that ERISA did not apply. *Id.* at 378.

Similarly, in *California Hospital Ass'n v. Henning,* 770 F.2d 856 (9th Cir. 1985), *cert. denied,* 477 U.S. 904 (1986) (*"Henning"*), the court found that certain vacation payments were exempt from ERISA's coverage because they did not arise from a plan. The benefits at issue in *Henning* arose from section 227.3 of the California

Labor Code and the California Supreme Court's 1982 interpretation of that statute in *Suastez v. Plastic Dress-Up Co.*, 31 Cal.3d 774, 183 Cal. Rptr. 846, 647 P.2d 122 (1982). In *Suastez*, the court ruled that under the California Wages Statute, employees' vacation entitlements vest as labor is rendered, and that employers must pay terminating employees pro rata shares of such benefits as wages. 31 Cal. 3d at 784, 183 Cal. Rptr. at 852, 647 P.2d at 128. As a result of the *Suastez* ruling, some California employers adopted policies forbidding payment of prorated vacation pay and prescribing certain forfeitures of vacation time. 770 F.2d at 858. Unlike other vacation pay cases that arose from employees' efforts to enforce employers' promises to grant certain vacation benefits, *Henning* arose from the employers' challenge to state-required vacation payments. *Id.*

Petitioner has relied heavily upon the *Henning* decision before both the Massachusetts Supreme Judicial Court and this Court. Yet, *Morash* and *Henning* do not conflict. In *Morash*, the court found that the bank's agreement to provide certain vacation benefits was an employee benefit plan. Since ERISA unquestionably preempts state laws relating to employee benefit plans, the court held that ERISA preempted application of Massachusetts law to the *Morash* plan. Whereas *Morash* involved enforcement of a private vacation benefits plan, *Henning* involved state-mandated vacation payments, rather than an employee benefit plan.[5] Consistent with

5. The *Henning* facts are actually more analogous to those in this Court's *Fort Halifax* decision, 107 S.Ct. 211 (1987), than

(Continued on following page)

the principles of *Morash*, the court ruled that ERISA did not preempt California law.[6]

Whether ERISA preempts a particular state law claim addressing vacation payments depends on the nature of the vacation benefits. Since those cases that Petitioner has characterized as conflicting do not involve vacation payments arising out of an employee benefit plan, *Morash* does not present a legal conflict requiring this Court's review.[7]

(Continued from previous page)

to those of *Morash*. Just as *Fort Halifax* addressed Maine's requirement that its employers make severance payments, *Henning* addressed California's requirement that its employers make certain vacation payments. *Henning* and *Fort Halifax* are similar for purposes of ERISA's preemptive coverage because neither involves an employer-sponsored employee benefit plan.

6. The *Henning* court also addressed the validity of a Department of Labor regulation, 29 C.F.R. § 2510.3-1(b) (1987), that distinguishes plan-based vacation benefits from payroll practice vacation benefits. In discussing the Regulation's validity, the court drew a distinction between "wage compensation" that ERISA does not regulate, and "benefit compensation" that ERISA does regulate. 770 F.2d at 861-62. That distinction supports Respondent's position that the type of benefits determines whether there is preemption, and that *Morash* does not conflict with *Henning*.

7. There is a third case, *Erich v. GAF Corp.*, 110 N.J. 230, 540 A.2d 518 (1988), that Petitioner contends conflicts with *Morash*. Two factors, however, distinguish *Erich*. First, the opinion focused on the propriety of the employer's change of vacation benefits policy, not on whether the benefits were provided pursuant to a plan. Second, and most importantly, the court based its analysis and decision on *federal* law, and chose the appropriate standard of review from ERISA. Since *Erich* addresses a different issue, the employer's right to change its vacation benefits plan, and since its decision follows federal standards, it does not conflict with *Morash;* in fact, it is consistent with the *Morash* holding that ERISA controls.

B. Since The Morash Decision Stems From A Particular Application Of One State's Nonpayment Of Wages Statute, The Decision's Implications Are Limited.

The question whether ERISA preempts state law claims has arisen in two different contexts—those involving common law contract actions for vacation benefits and those involving application of state wages statutes to vacation benefits.[8] The issue in *Morash* is limited to preemption of a wages statute.

Petitioner has cited only two cases that address a state wages statute's application to vacation payments. The first case is *People v. Art Steel Co., Inc.*, 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986). *Art Steel* addresses the New York wages statute, section 198-c, that states:

> . . . any employer who is party to an agreement to pay or provide benefits or wage supplements [which includes vacation pay] to employees or to a third-party or fund for the benefit of employees and who fails [to make such payments] shall be guilty of a misdemeanor.

Consistent with *Morash*, in *Art Steel*, the New York criminal court found that ERISA preempts section 198-c in those cases that involve vacation benefits prescribed by

---

8. The amici curiae brief indicates that other states are concerned about their nonpayment of wages statutes. Respondent again stresses that the *Morash* decision addresses only the Massachusetts statute and its application to a particular plan-based vacation pay claim. In addition, despite repeated references in the amicus brief to the importance of protecting wages, the *Morash* decision neither addressed nor implicated regular wage claims, claims for vacation pay during employment, or vacation benefits created by state law.

an employee benefit plan. 133 Misc. at 1005-07, 509 N.Y.S.2d at 718-19.

The second case is *California Hospital Ass'n v. Henning*, 770 F.2d 856 (9th Cir. 1985), *cert. denied*, 477 U.S. 904 (1986). *Henning* is the only case that Petitioner has identified as a conflicting decision involving a state wages statute. As the *Henning* opinion explains, however, both section 227.3 of the California Labor Code and California's use and interpretation of that statute are very different from those of Massachusetts. The California statute provides:

> [W]henever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, *all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy.* . . . (emphasis added)

As is discussed above, *supra* pp. 9-10, the California Supreme Court construed section 227.3 to mean that California requires that vacation entitlements vest as labor is rendered, and therefore employers must pay terminated employees such benefits as wages. 31 Cal.3d at 784, 183 Cal. Rptr. at 852, 647 P.2d at 128.

Thus California's statutory vacation pay requirement differs from Massachusetts' statutory enforcement of employers' programs or plans regarding vacation benefits. Whereas the California statute requires employers to make certain payments regardless of whether they have plans agreeing to them, just as the Maine statute addressed in *Fort Halifax* does, the Massachusetts Wages

Statute compels employers to make payments in *compliance with their own plans,* just as ERISA does.

In summary, the ruling of *Morash* is a limited one. It simply states that since the parties stipulated that accrued vacation payments were due at termination pursuant to an oral or written agreement, an employee benefit plan was involved. Given the existence of such a plan, ERISA preempted the Massachusetts Wages Statute.

II. BECAUSE THE MORASH DECISION IS CONSISTENT WITH FORT HALIFAX, THIS COURT NEED NOT REVIEW MORASH.

In 1987, this Court ruled that a Maine plant-closing statute requiring a one-time severance payment was not an employee benefit plan, and as a result not preempted by ERISA. *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211 (1987). Petitioner argues, quite mistakenly, that *Morash* is inconsistent with the *Fort Halifax* decision.

Petitioner's reliance on *Fort Halifax* is incorrect because the facts of that case are clearly distinguishable. Whereas the Maine statute applies when an employer *does not have a plan or agreement to provide a benefit to its employees,* 107 S.Ct. at 2217-18, the Massachusetts Wages Statute comes into play *only if an employer has a plan.* But for an employer's agreement to provide certain vacation benefits to employees who sever their employment relationship, the Commonwealth of Massachusetts could not prosecute under its Wages Statute.

Since preemption depends upon whether a law relates to any employee benefit *plan,* 107 S.Ct. at 2217, and since the Maine and Massachusetts statutes differ in that one

protects employees in the absence of a severance plan, whereas the other protects employees in the face of a vacation benefits plan, the *Morash* court's finding that ERISA preempts the Massachusetts Wages Statute is consistent with the principles of *Fort Halifax.*

III. BECAUSE LOWER COURT DETERMINATIONS OF WHETHER THE "GENERALLY APPLICABLE CRIMINAL LAWS" EXCEPTION TO ERISA'S PREEMPTION APPLIES TO STATE STATUTES ARE NOT CONFUSED, THIS COURT NEED NOT EXPLAIN THE EXCEPTION'S MEANING.

Although ERISA's preemption is express and broad, the preemption is subject to several narrow exceptions. Petitioner has argued that if ERISA would otherwise preempt the Massachusetts Wages Statute as it relates to vacation payments stemming from employee benefit plans, the statute is exempted from that preemption because it falls within ERISA's exception for "generally applicable criminal laws," 29 U.S.C. § 1144(b)(4). (Pet. at 26-29) The *Morash* court disagreed, however:

> Because our statute is limited to the non-payment of "wages" by an employer to an employee, including agreed-upon vacation payments which will often be funded from "employee benefit plans," prosecution under the statute is not saved from preemption by the exception for "generally applicable criminal laws."

(Pet. at A-31, 32)

As Petitioner, the Commonwealth has suggested that this Court should review the *Morash* ruling because there is "great confusion among the lower courts" about the meaning of the phrase "generally applicable criminal

laws." (Pet. at 26) Respondent submits that, in fact, through rulings that are legally consistent, lower court decisions tend to suggest understanding of the exception, and that Petitioner has hung its claim of "great confusion" on the single thread of a single inconsistent decision.

Again, the legal principles are consistent and clear: First, Congress has expressly instructed that ERISA shall preempt state laws that relate to employee benefit plans, 29 U.S.C. § 1144(a).[9] Second, this Court has strongly advised that ERISA's preemption is to be construed and applied broadly. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

Appreciative of those principles, several courts have considered the question of when the exception for "generally applicable criminal laws" applies. Since there normally is no issue over whether a state statute is criminal, the inquiries typically focus on whether a criminal statute is "generally applicable." In 1981, the Massachusetts Supreme Judicial Court explained its determination clearly:

> The § 1144(b)(4) exception from preemption for "generally applicable" State criminal laws appears

---

9. ERISA's legislative history expresses Congress' expectation that the preemption should "foreclose the possibility that benefit plans would be subjected to conflicting and inconsistent state and local laws." 120 Cong. Rec. 29,993 (1974) (statements of Senator Williams). To achieve that goal, it was intended that ERISA would "apply in its broadest sense to all actions of state and local governments." *Id.* at 32,430. *See also, Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, 439 U.S. 831 (1978).

> designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example. By virtue of § 1144(b)(4), a State is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan, simply because the theft involved such a plan. But by limiting the . . . exception to criminal laws of *general* applicability, Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans.

Commonwealth v. Federico, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377-78 (1981) (emphasis in original).

Several courts have adopted the reasoning of *Federico*. In 1983, the United States District Court for the Eastern District of New York recognized that "by limiting the exclusion from preemption to only those criminal laws of 'general' applicability, Congress manifested a purpose to supersede criminal laws directed specifically at employee benefit plans," and followed *Federico*. *Trustees of Sheet Metal Workers' Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561, 563 (E.D.N.Y. 1983). Like *Federico*, the *Aberdeen* decision distinguished "criminal laws applying in general terms to conduct such as larceny or embezzlement" from laws purposefully regulating or targeting benefit plans. *Id.*

Also in 1983, the United States District Court for the Northern District of Illinois cited *Federico* and ruled

that the Illinois Wage Payment Collection Act was not a generally applicable criminal law. *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337, 341 (N.D. Ill. 1983). In 1986, the Criminal Court of the City of New York followed *Federico* and *Aberdeen* to rule that the New York wages statute, Labor Law section 198-c, is not a generally applicable criminal law. *People v. Art Steel Co.*, 133 Misc.2d 1001, 1009, 509 N.Y.S.2d 715, 720 (1986).

Against that background, Petitioner has discussed one case, *Upholsterers' Int'l Union v. Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C.D. Ill. 1986) that found that a wages statute was a generally applicable criminal law. Respondent cannot deny that that decision is out of step with others. The fact, however, that two years ago one court erred regarding interpretation of an ERISA exception with which other courts have had little difficulty does not warrant this Court's review.[10]

Furthermore, whether a state's statute is a "generally applicable" criminal law depends on the language and application of that statute. Insofar as Congress has permitted this exception to ERISA's broadly preemptive purpose, it most likely intended to respect the states' traditional right to prevent general criminal activity. If, therefore, a state decides that its own statute is *not* a generally applicable criminal law, in support of federal preemption, there is no reason for this Court to substitute its judgment for that of the state court. The state court is in a better position to determine which of its state's laws are "generally applicable."

10. At the very end of its discussion, Petitioner refers to, but does not discuss, a decision of the Civil Court of the City of New York, *Goldstein v. Mangano*, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1978). (Pet. at 29) Since *Goldstein* was the decision of a city court, was issued prior to the reasoning and guidance of *Federico* and the other cases Respondent has discussed above, and has recently been rejected by a criminal court of the City of New York in *People v. Art Steel Co., Inc.*, 133 Misc.2d 1001, 1007-09, 509 N.Y.S.2d 715, 719-20 (1986), it adds little support to Petitioner's argument.

CONCLUSION

For the above-stated reasons, this Court should deny the Commonwealth of Massachusetts' Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court.

Respondent
RICHARD N. MORASH,
By his attorneys,

JASON BERGER
MARCIA E. GREENBERG
TESTA, HURWITZ & THIBEAULT
Exchange Place
53 State Street
Boston, MA 02109
(617) 367-7500

Dated: August 25, 1988

(2)

No. 88-32

IN THE

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

against

RICHARD N. MORASH,

Respondent.

On Appeal from the Supreme Judicial Court of the State of Massachusetts

BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF PETITIONER, THE COMMONWEALTH OF MASSACHUSETTS

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amici Curiae
120 Broadway—3rd Floor
New York, New York 10271
(212) 341-2685

O. PETER SHERWOOD
Solicitor General
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

JANE LAUER BARKER
Assistant Attorney General
in Charge of Labor Bureau

M. PATRICIA SMITH
JENNIFER S. BRAND
Assistant Attorneys General
Of Counsel

AMICI States

Connecticut
John J. Kelly
Chief State's Attorney
P.O. Box 5000
Wallingsford, CT 06492

Florida
Robert A. Butterworth
Attorney General
State Capitol
Tallahassee, Florida 32399-1050

Illinois
Neil F. Hartigan
Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Maine
James E. Tierney
Attorney General
Statehouse
Station 6
Augusta, Maine 04333

Minnesota
Hubert H. Humphrey, III
Attorney General
State of Minnesota
Suite 200
520 Lafayette Road
St. Paul, MN 55155

New Hampshire
Stephen E. Merrill
Attorney General
25 Capitol Street
Concord, N.H. 03301-6397

New York
Robert Abrams
Attorney General
120 Broadway
New York, New York 10271

North Carolina
Lacey H. Thornburg
Attorney General
P.O. Box 629
Raleigh, N.C. 27602-0629

and

John C. Brooks
Commissioner of Labor
4 West Edenton Street
Raleigh, North Carolina 27601

Oklahoma
Robert H. Henry
Attorney General
Room 112
State Capitol
Oklahoma City, Oklahoma 73105

Vermont
Jeffrey L. Amestoy
Attorney General
109 State Street
Montpelier, VT 05602

Wisconsin
Donald J. Hanaway
Attorney General
114 East, State Capitol
P.O. Box 7857
Madison, Wisconsin 53707-7857

Wyoming
Joseph B. Meyer
Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-32

IN THE

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

against

RICHARD N. MORASH,
Respondent.

On Appeal from the Supreme Judicial Court of the State of Massachusetts

BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF PETITIONER, THE COMMONWEALTH OF MASSACHUSETTS

Statement of Interest of *Amici Curiae*

This brief is filed on behalf of 12 states as *amici curiae* pursuant to Rule 36.1 and 36.4 of the Supreme Court Rules, in support of the petition for a writ of certiorari filed by petitioner, the Commonwealth of Massachusetts, in the above-entitled case.

The issues raised by the appeal in this case are of critical importance to all states, including New York and the 11 other *amici* joining in this brief. The Supreme

Judicial Court of the Commonwealth of Massachusetts has held that the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* bars a state from criminally prosecuting an employer who violates an agreement to pay an employee for unused vacation time.

In New York and the other *amici* states, state governments actively assist their citizens in recovering unpaid wages either through a wage payment statute or common law contract rights. Many of the statutes either explicitly include vacation payments or have been interpreted to apply to them. New York and many of the *amici* states impose criminal penalties for the failure to pay vacation wages. ERISA preemption in this area would dramatically reduce the protection that workers now receive because federal law and enforcement mechanisms do not provide sufficient remedies for wrongfully denied vacation pay.

Civil and criminal wage and hour enforcement, including vacation pay regulation, is part of the traditional state role in protecting its citizens in the field of labor relations. *Amici* submit this brief because of their substantial interest in retaining the ability to protect workers from abusive employment practices.

Summary of Argument

This Court should grant certiorari in this case to address two issues concerning ERISA preemption which are of great importance to all states and which affect millions of employees. There is a sharp conflict between courts in

various jurisdictions as to whether ERISA preempts state regulation and enforcement of employers' obligations to pay vacation wages. These inconsistent decisions have created confusion among state governments which are unsure of the status of their enforcement efforts in this area.

The Court should grant certiorari to resolve the conflict and to prevent the negative results that the decision of the Supreme Judicial Court would have. Federal preemption of this area, which has long been regulated by the states, would result in severely weakened protection for workers who have been denied promised benefits.

This case also presents an important issue of ERISA preemption which has never been considered by this Court. This Court should grant certiorari to determine whether by exempting "generally applicable criminal laws" from ERISA preemption, Congress intended to exempt wage payment statutes, like the Massachusetts statute, and to allow states to continue to enforce their general criminal laws affecting the employment relationship.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE TO ALL STATES AND MILLIONS OF EMPLOYEES THROUGHOUT THE COUNTRY.

Most workers in America receive some form of paid vacation. In many instances employers permit vacation benefits to be taken during the year as vacation time or at the end of the year as payment in lieu of vacation. Many employers also pay accrued vacation to employees at the

termination of employment, either because it is the employer's policy to do so, or because state law requires such a payment.[1]

Nearly every state has a statute which enforces the payment of wages. In addition to Massachusetts, at least forty-six states and the District of Columbia have wage payment statutes. Over half of these statutes explicitly include, or have been interpreted to include, vacation wages. Thirty-three of the states impose criminal sanctions.[2] Thus, the issues raised by the petition for a writ of certiorari affect most states and millions of employees in America.

A. This Court Should Resolve The Conflicting Decisions Concerning ERISA Preemption Of Vacation Pay.

Enforcement of an employer's obligations to compensate its employees has long been considered part of a state's role in protecting its citizens.[3] Historically, federal laws

1. *See e.g., Suastez* v. *Plastic Dress-up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982) *Livestock Needs Inc.* v. *Local Union No. 1634*. 221 Miss. 492, 73 So.2d 128 (1954); *Valeo* v. *J.I. Case Co.*, 18 Wisc. 2d 578, 119 N.W.2d 384 (1963).

2. Appendix B of the Petition for a Writ of Certiorari is a list of these state statutes. The list indicates which statutes cover vacation wages and which ones impose criminal penalties.

3. In New York, for example, Labor Law § 198-a and § 198-c make it a misdemeanor for an employer to fail to pay agreed-upon wages or vacation pay. This statute has existed in some form since at least 1909. Labor Law § 198-a, Historical Note (McKinney 1986). Indeed, as early as 1910, a provision requiring railroad companies to pay their workers in cash semi-monthly and making it a misdemeanor to fail to do so, survived a constitutional challenge in the Court of Appeals and was found to be a valid exercise of a state's police powers. *The New York Central and Hudson River Railroad Company* v. *John Williams, as Commissioner of Labor*, 199 N.Y. 108, 92 N.E. 404 (1910). Similarly, Massachusetts Gen. Law c. 149 § 148 has existed in some form since 1879 (see Historical Note, MGLA 1982) and in 1895, the justices of the Supreme Judicial Court found a law requiring manufacturers to pay their employees weekly, a constitutional exercise of state power . *In re House Bill No. 123* 40 N.E. 713, 163 Mass. 589 (1895). Other state statutes also date from the late nineteenth century. *See e.g.*, Pa. Stat. Tit. 43 § 271 (Purdon 1964) (enacted in 1891); Wisc. Stat. § 109.03, Historical Note (W.S.A. 1988) (existing in some form since 1889).

(footnote continued on next page)

regulating employee compensation have permitted the state to establish or maintain parallel legislation providing similar or more protective rights, and have left them free to establish administrative mechanisms to make enforcement of claims a real possibility for workers who might otherwise be unable to obtain judicial enforcement. *See, e.g.*, The Fair Labor Standards Act, 29 U.S.C. § 218(a); The Age Discrimination in Employment Act, 29 U.S.C. § 633; and The Civil Rights Act of 1964, 42 U.S.C. § 2000h-4.

In most of the *amici* states, administrative procedures exist to enforce employers' obligations to pay vacation wages. In New York State, for example, an employee who has been denied vacation pay can file a complaint with the State Department of Labor and have the state pursue the claim on his or her behalf. *Amici* consider the power to enforce these statutes, or an employee's common law contract rights, to be central to their role in protecting the welfare of the workers in our states.

However, these enforcement procedures and the ability to use these powers have been thrown into a state of confusion by conflicting decisions on whether ERISA preempts the states from enforcing laws that mandate the payment of

vacation wages.[4] In states where the courts have not ruled on whether state law is preempted by ERISA, state governments do not know whether to continue to enforce vacation pay laws. It is difficult, if not impossible, to give definitive advice to workers or employers. This Court should act to resolve this confusion about state jurisdiction over vacation pay.

The state and federal courts which have already ruled on this issue are split on whether state enforcement of vacation pay obligations is preempted by 29 USC § 1144(a).[5] Two circuit courts and one state court have upheld state regulation in the area, *Shea* v. *Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987); *California Hospital Association* v. *Henning*, 770 F.2d 856 (9th Cir 1985) *cert. denied*, 477 U.S. 904 (1986); *Erich* v. *GAF Corp.*, 110 N.J. 230, 540 A.2d 518 (1988) while two other circuit courts and Massachusetts in the instant case have held that ERISA preempts such state laws. *Holland* v. *National Steel Corp.*, 791 F.2d 1132 (4th Cir. 1986) *Blakeman* v. *Mead Containers*, 779 F.2d 1146 (6th Cir. 1985).

The cases which have permitted states to continue to regulate vacation pay have considered such pay an ex-

4. In New York there is even a conflict between state and federal courts. The Second Circuit in *Shea* v. *Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987) held that vacation wages were not subject to ERISA regulation while in *People* v. *Art Steel Co., Inc.*, 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986), the court held ERISA preempts the New York criminal wage collection statute as it applies to vacation wages.

5. 29 USC § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

empted "payroll practice" under a U.S. Department of Labor regulation defining non-ERISA benefits. 29 C.F.R. § 2510.3-1(b). This regulation, promulgated shortly after ERISA's enactment, specifically excludes vacation wages from ERISA coverage because they are similar to ordinary wages. In describing why such benefits were excluded from coverage, the Department of Labor explained that:

> Paid sick leave and paid vacations are not treated as employee benefit plans because they are associated with regular wages or salary rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area and there is no indication that Congress intended to subject these practices to Title I coverage.

40 Fed. Reg., no. 111, p. 24642 (1975).

The cases upholding state enforcement of vacation pay obligations have also looked to ERISA's history for guidance. In *California Hospital Association* v. *Henning*, 770 F.2d at 859, the Ninth Circuit discussed how, in adopting ERISA, Congress was primarily concerned with regulating private pension plans and that it sought to eliminate two principal abuses: the mismanagement of funds accumulated to finance benefits and the failure to provide such benefits. The court found that vacation wages "presented neither of the evils Congress intended to address . . . there is no fund to administer and no special risk of loss or nonpayment. Nothing in the legislative history suggests Congress intended to regulate such payments." *Id.* at 859.

The cases supporting federal preemption of vacation pay regulation, on the other hand, have held, like the Massa-

chusetts court, that vacation pay is covered by ERISA because "vacation benefits" are one of the enumerated benefits in 29 U.S.C. § 1002(1), ERISA's definitional section.[6] In the decision in this case, the Supreme Judicial Court of Massachusetts, without explanation, found Mass. Gen. Law c. 149, § 148, the regulation concerning payroll practices, inapplicable on the ground that it applied "only to an employer's discretionary practices and not to those contractually required". *See Brief for Petitioner*, P. A-12.

We urge this Court to grant certiorari in this case both to resolve the split in the circuits and the state courts and to avoid the negative result that the Massachusetts decision would have. The effect of ERISA preemption in the area of vacation pay would be to drastically reduce the protection that workers now have against employers who fail to pay them vacation wages. The extensive system of state regulation and enforcement in this area, both criminal and civil, would be replaced by what one commentator has called, a "regulatory vacuum". Note, *Unfunded Vacation Benefits, Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702, 1703 (1987).

6. This part of the ERISA statute describes any "plan, fund or program" established "through the purchase of insurance or otherwise" providing "vacation benefits" as covered by ERISA. One recent commentator has argued that this section was not meant to be applied to ordinary vacation benefits but instead to those funded from a trust. Vacation benefits funded from a trust are generally pooled vacation plans that are set aside for employees, in industries such as construction or farming, who work for different employers during the year. The employers contribute to a central fund which pays out vacation benefits. Note, *Unfunded Vacation Benefits, Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702, 1703 n. 12 (1987). *See also, Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 5 (1983).

In contrast to the state regulatory system, ERISA does not provide an administrative mechanism for the collection of benefits, 29 U.S.C. § 1132(a). An employee's only remedy for the nonpayment of vacation wages would be to sue in court and federal court would be available in all cases, no matter how small the claim. As the 7th Circuit has warned, federal preemption of vacation pay "could bring a host of trivial cases into the federal courts" *National Metalcrafters Division of Keystone* v. *McNeil*, 784 F.2d 817, 823 (7th Cir. 1986), *cert. denied* 107 S. Ct. 403 (1986).

Furthermore, the standard by which a vacation pay claim would be judged under ERISA is far weaker than the standard that is used by the states. Because there are no specific standards in ERISA regarding vacation benefits, any challenges would have to rely on the claim that an employer breached its fiduciary duty. Thus, rather than simply determining whether an employer breached a contractual obligation, the standard used would be whether the employer breached its fiduciary duty by acting arbitrarily and capriciously. *See, e.g., Pompano* v. *Michael Schiavone and Sons, Inc.*, 680 F.2d 911 (2d Cir. 1982). This standard might not be considered breached if an employer's decision was made to avoid substantial costs. *See, e.g., Jung* v. *EMC Corp.*, 755 F.2d 708, 711 (9th Cir. 1985). Thus, an employer could simply make a decision not to pay vacation wages because of the cost and under ERISA, its actions might well be protected regardless of past promises.

For these reasons, this Court should act to resolve the conflict surrounding the regulation of vacation benefits. States must know whether their continued enforcement of

vacation pay collection statutes is a valid exercise of state police power or whether they have been preempted by federal law. By granting certiorari in this case, this Court can make a definitive ruling on this issue.

B. This Court Should Determine A Substantial Issue Never Considered By The Court, Whether A Criminal Wage Collection Statute Is A "Generally Applicable Criminal Law" Excluded From ERISA Preemption.

The petition for a writ of certiorari also raises the issue of whether the Massachusetts wage collection statute is a generally applicable criminal law within the meaning of ERISA. ERISA specifically excludes from preemption "generally applicable criminal law[s]" 29 U.S.C. § 1144(b)(4). The Massachusetts Wage Collection statute in this case is a criminal statute. Thirty-three other states have similar criminal statutes.

Because the ERISA preemption cases previously decided by this Court are civil cases, this Court has never interpreted the phase "generally applicable criminal law". The lower courts which have interpreted this term have issued conflicting decisions. The Court should provide the lower courts with guidance by granting certiorari to make a definitive ruling on this issue.

Under 29 U.S.C. § 1144(a), the provisions of ERISA "supersede [with certain exceptions] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The exception set forth in § 1144(b)(4) provides that the preemption provision "shall not apply to any generally applicable criminal law of a state."

Because there is very little guidance in the history of ERISA from which to determine the meaning of this exception, courts have had little to rely on in interpreting the term "generally applicable." Several courts have included wage payment collection statutes within this exception because they are penal statutes which apply to all employees and do not specifically regulate benefit plans. *See, Upholsterer's International Union Health and Welfare Fund Trustees* v. *Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C. D. Ill. 1986); *National Metalcrafters Division of Keystone* v. *McNeil*, 602 F. Supp. 232 (N.D. Ill. 1985), *rev'd on other grounds*, 784 F.2d 817 (7th Cir. 1986); *Goldstein* v. *Mangano*, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1978). Other courts, like the Supreme Judicial Court of Massachusetts, have interpreted "generally applicable" to apply only to criminal laws that apply to conduct which could be committed by all citizens, such as theft or embezzlement. Thus, under that interpretation, a person who steals from a benefits fund would not be exempt from criminal prosecution. *Sforza* v. *Kenco Construction Contracting*, 674 F. Supp. 1493 (D. Conn. 1986); *Baker* v. *Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983); *Trustees of Sheet Metal Workers' International Association Production Workers' Welfare Fund* v. *Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983); Commonwealth v. *Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981).

A state's power to criminalize certain behavior and to enforce its criminal laws is central to a state's police power. By exempting "generally applicable" criminal laws from ERISA preemption, Congress recognized this and sought to avoid interference with a state criminal enforcement

scheme. We urge this Court to grant certiorari in this case to reaffirm this principle and resolve the existing dispute on the meaning of this exception.

Conclusion

For all of the foregoing reasons, this Court should grant certiorari to the Commonwealth of Massachusetts to review the significant questions of law raised by this case.

Dated: New York, New York
July 29, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amici Curiae
120 Broadway—3rd Floor
New York, New York 10271
(212) 341-2685

O. PETER SHERWOOD
Solicitor General
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

JANE LAUER BARKER
Assistant Attorney General
in Charge of Labor Bureau

M. PATRICIA SMITH
JENNIFER S. BRAND
Assistant Attorneys General
Of Counsel

Certificate of Service

I hereby certify that I have this day served copies of the foregoing Brief of *Amici Curiae* State of New York, *et al* upon:

JAMES M. SHANNON
Attorney General
of the State of Massachusetts
MARC C. LAREDO
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, MA 02108

Attorneys for Petitioner

JASON BERGER, P.C.
MARCIA E. GREENBERG
TESTA, HURWITZ & THIBEAULT
Exchange Place
53 State Street
Boston, MA 02109

Attorneys for Respondent

by depositing true copies of same in the United States mail, first class postage prepaid at New York, New York. This 1st day of August, 1988.

/s/ Jennifer S. Brand

JENNIFER S. BRAND
Assistant Attorney General

(4)

No. 88-32

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

JOINT APPENDIX

JAMES M. SHANNON
Attorney General
Commonwealth of
Massachusetts
MARC C. LAREDO*
Assistant Attorney
General
Criminal Bureau
One Ashburton Place
Boston,
Massachusetts 02108
(617) 727-2200 ext. 2818
Counsel for Petitioner

JASON BERGER*
MARCIA E. GREENBERG
TESTA, HURWITZ &
THIBEAULT
53 State Street
Boston,
Massachusetts 02109
(617) 367-7500
Counsel for
Respondent

*Counsel of Record

Petition for Certiorari filed
July 5, 1988
Certiorari granted October 3, 1988

238

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

Date	Proceedings
1986	
May 29	Criminal Complaint Docket No. 216230 (Winslow)
May 29	Criminal Complaint Docket No. 216231 (Tuttle)
June 12	Morash pleads not guilty
Nov. 4	Motion to Dismiss filed
Nov. 10	Hearing on the Motion to Dismiss
1987	
Jan. 7	Report of a Question of Law to the Appeals Court Pursuant to Massachusetts Rule of Criminal Procedure 34 and Stipulation of Facts filed
Jan. 14	Interlocutory report forwarded to Appeals Court
Jan. 15	Docketed in Appeals Court, A.C. No. 87-40
March 23	Morash's Brief filed
April 16	Order of Supreme Judicial Court transferring case from Appeals Court
April 24	Docketed in Supreme Judicial Court, S.J.C. No. 4463

1987

July 27 — Commonwealth's Brief filed

Sept. 21 — Morash's Reply Brief filed

1988

May 5 — Supreme Judicial Court Decision

May 5 — Supreme Judicial Court Rescript

CRIMINAL COMPLAINT Docket Number 216230

Trial Court of Massachusetts
Boston Municipal Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE BOSTON MUNICIPAL COURT DEPARTMENT

The within named and undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below in the City of Boston and within the judicial district of Boston Municipal Court.

Boston Municipal Court

CC# none
Name, Address & Zip Code of Defendant

Richard N. Morash, Pres.
Home Savings Bank
69 Tremont St.
Boston, MA

Def.Dob	Offense Code(s) 411a
Date of Offense 5/24/85	Place of Offense 100 Cambridge St.
Complainant Christopher C. Winslow/Hood Dept. of Labor & Indus.	

Date of Complaint	Return Date and Time
5/29/86	6/12/86 9 AM

Count-Offense
A. VIOLATION WEEKLY WAGE LAWS C149 S148

did employ Christopher C. Winslow, as Vice President, and the said Christopher Winslow being discharged from said employment, did not then and there receive pay in full, on the day of his discharge, the wages earned by and due him/her amounting to $14,520.00.

Count-Offense
B.

Count-Offense
C.

Count-Offense
D.

Complainant or Authorized Officer

Sworn to before
Clerk-Magistrate/Asst.Clerk

On (Date) 5/29/86

CRIMINAL COMPLAINT Docket Number 216231

Trial Court of Massachusetts
Boston Municipal Court Department

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE BOSTON MUNICIPAL COURT DEPARTMENT

The within named and undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below in the City of Boston and within the judicial district of Boston Municipal Court.

Boston Municipal Court

CC# none
Name, Address & Zip Code of Defendant

Richard N. Morash, Pres.
Home Savings Bank
69 Tremont St.
Boston, MA

Def.Dob	Offense Code(s)
	411

Date of Offense	Place of Offense
4/19/85	100 Cambridge St.

Complainant
William Tuttle/Hood
Dept. of Labor & Indus.

Date of Complaint	Return Date and Time
5/29/86	6/12/86 9 AM

Count-Offense
A. VIOLATION WEEKLY WAGE LAWS C149 S148

did employ William Tuttle, as Senior Vice President, and the said William Tuttle being discharged from said employment, did not then and there receive pay in full, on the day of his discharge, the wages earned by and due him/her amounting to 12,473.33.

Count-Offense
B.

Count-Offense
C.

Count-Offense
D.

Complainant or Authorized Officer

Sworn to before
Clerk-Magistrate/Asst.Clerk

On (Date) 5/29/86

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPT.
BOSTON MUNICIPAL COURT

Docket Nos.
21-62-30
21-62-31

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

RICHARD N. MORASH,
HOME SAVINGS BANK,
Defendants.

MOTION TO DISMISS

Pursuant to Mass. R. Crim. P. 13(c), defendants Yankee Bank for Finance and Savings, F.S.B. (formerly known as Home Savings Bank, F.S.B.) and its president, Richard N. Morash, (together "Yankee Bank") hereby move that this Court dismiss the above-captioned actions for lack of subject matter jurisdiction or,

in the alternative, for failure to charge an offense. As grounds therefor Yankee Bank states as follows:

(1) The Massachusetts Department of Labor and Industries (the "DLI") has brought this action under the Massachusetts Payment of Wages Statute, G.L. c.149, §148 ("Chapter 149"). The DLI charges that Yankee Bank has unlawfully failed to pay two terminated vice presidents, Mr. Christopher C. Winslow and Mr. William R. Tuttle (the "claimants"), for unused vacation time. Mr. Winslow claims he is entitled to a total payment of $14,520 for 66 unused vacation days. Mr. Tuttle claims he is entitled to a total

payment of $11,146.38 for 42 unused vacation days.[1/]

(2) Chapter 149 provides that vacation pay constitutes wages if it is due to employees pursuant to a written or oral agreement. The DLI has taken the position that Yankee Bank made such an agreement if it had a formal policy or practice of making such payments.

(3) Yankee Bank submits that if, arguendo, the bank had such a policy or agreement, then the Employee Retirement Income Security Act of 1974, 29 U.S.C.

1/ The DLI also charges that Yankee Bank has failed to pay Mr. Tuttle for five (5) days actually worked. Yankee Bank, however, tendered payment of $971.02 to Mr. Tuttle on April 17, 1985. Mr. Tuttle refused to accept the check because it did not include vacation pay. Those charges are not covered by this Motion.

§1001 et seq. ("ERISA") preempts these actions under Chapter 149. As grounds therefor, Yankee Bank states:

(a) Section 1144(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any benefit plan . . ." (emphasis added)

(b) These cases involve state law because they are brought under M.G.L. c.149.

(c) M.G.L. c.149 relates to a benefit plan because (1) according to §1002(1) of ERISA, an employee welfare benefit plan is:

> any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . vacation benefits . . . (emphasis added)

and (2) in Barry v. Dymo Graphic Systems, Inc., the Supreme Judicial Court ruled that an employer's contractual agreement to pay employees for accrued but unused vacation time is a plan or program to provide vacation benefits covered by ERISA.

(4) This Court is obligated to follow the controlling precedent of Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830 (1985) in which the Supreme Judicial Court held (a) that an employer's agreement by

handbooks, manuals and memoranda to pay employees for unused vacation pay, is a vacation benefits plan under ERISA and (b) that ERISA preempts actions under state law to collect benefits under such a plan.

(5) In the alternative, Yankee Bank submits that if the DLI takes the position that the bank did not have a vacation pay plan or program covered by ERISA, then the DLI cannot prove a violation of Chapter 149. If, rather than having a plan or formal policy, the bank gave employees payment in lieu of vacation only on an ad hoc, discretionary basis, then there was no agreement to make such payments and failure to pay Messrs. Winslow and Tuttle for unused vacation time

is not a violation of Chapter 149.

WHEREFORE, Yankee Bank respectfully requests that this Court dismiss Mr. Winslow's case in its entirety and Mr. Tuttle's case with respect to vacation pay.

YANKEE BANK FOR FINANCE AND SAVINGS, F.S.B. and
RICHARD N. MORASH,
By their attorneys,

Jason Berger, P.C.
Marcia E. Greenberg
Peabody & Brown
One Boston Place
Boston, MA 02108
617-723-8700

Date: November 3, 1986

Certificate of Service

I, Marcia E. Greenberg, attorney for the Defendants, hereby certify that I have had a copy of the attached Motion to Dismiss delivered by hand to Keith A. Hood, Senior Counsel, Department of Labor and Industries, 100 Cambridge Street, Boston, MA 02202, attorney for the plaintiff.

Signed under the pains and penalties of perjury this 3d day of November, 1986.

Marcia E. Greenberg

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPT.
BOSTON MUNICIPAL COURT

Docket Nos.
866-817, 818

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

RICHARD N. MORASH,
Defendant.

REPORT OF A QUESTION OF LAW TO THE APPEALS COURT PURSUANT TO MASSACHUSETTS RULE OF CRIMINAL PROCEDURE 34

The Commonwealth of Massachusetts contends that the defendant in these cases violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants, two former employees, for vacation time that they accrued but did not use. The defendant has filed a motion to dismiss, alleging that the Commonwealth cannot prosecute these cases

because Section 148 is preempted by federal law. This motion raises an important question of law that, in my judgment, requires a decision from this Court. Therefore, I report the following question of law pursuant to Mass. R. Crim. P. 34:

Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA") preclude prosecution of an employer who has allegedly violated G.L. c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement?

Attached is a Stipulation of Facts prepared by the parties in this case.

John A. Pino
Associate Justice of the
Boston Municipal Court

Date: January 7, 1987

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPT.
BOSTON MUNICIPAL COURT

Docket Nos.
866-817
866-818

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

RICHARD N. MORASH,
Defendant.

STIPULATION OF FACTS

For the purpose of reporting the following question of law to the Massachusetts Appeals Court, pursuant to Rule 34 of the Massachusetts Rules of Criminal Procedure and the November 24, 1986 Order of this Court, the parties hereby submit this Stipulation of Facts.

Question Reported

Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA"), preclude prosecution of an employer who has allegedly violated G.L. c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement?

Stipulation of Facts

The defendant in these cases, Richard N. Morash ("Mr. Morash"), is the president of The Yankee Bank for Finance and Savings, F.S.B., formerly known as Home Savings Bank, F.S.B. (the "Bank"). In May, 1984 The Yankee Companies, Inc. acquired the stock of Home Savings Bank, F.S.B. Home Savings Bank had been in serious financial trouble and was threatened with a regulatory merger.

On May 29, 1986 Messrs. Christopher C. Winslow and William R. Tuttle (the "complainants"), each a former vice-president of the Bank, applied for and were granted criminal complaints in the Boston Municipal Court. Mr. Winslow alleged that the Bank discharged him on May 24, 1985, and that it owes him $14,520 for 66 unused vacation days. Mr. Tuttle alleged that the Bank discharged him on April 19, 1985, and that it owes him $11,146.38 for 42 unused vacation days. The Commonwealth contends that the Bank violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants for vacation time they accrued but did not use.

The Commonwealth, through the Department of Labor and Industries (the "DLI"), is prosecuting these criminal complaints. The DLI and Mr. Morash agree that the following elements of the DLI's

prima facie case are undisputed: (1) that the complainants were employed by the Bank, (2) that the Bank terminated the complainants' employment relationships with the Bank and (3) that the Bank did not offer to pay the complainants the amount of vacation time that they claim they are owed (although it did offer to pay them for vacation time that they accrued after January 1, 1985).

The Question in these cases arises from Section 148's provision that where there is an oral or written agreement to compensate employees for vacation time, vacation pay constitutes wages. For the purposes of this Question only, it is agreed that the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time. Also for the purposes of this Question only, it is agreed that such agreements stem from

handbooks, manuals, memoranda and practices. It is further agreed that when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets.

On November 3, 1986 Mr. Morash moved to dismiss both complaints on the grounds that, in order for the DLI to prove a violation of Section 148, it must prove the existence of an oral or written agreement or policy to compensate employees for all unused vacation time. The Defendant's contention is that proof of such an agreement or policy would constitute proof of a welfare benefit plan, which would fall within ERISA's exclusive jurisdiction.

Respectfully submitted,

RICHARD N. MORASH,
By his attorneys,

Jason Berger, P.C.
Marcia E. Greenberg
Peabody & Brown
One Boston Place
Boston, MA 02108
617-723-8700

COMMONWEALTH OF MASSACHUSETTS,
By its attorneys,

Keith A. Hood, Senior Counsel
Edward F. Connelly, Senior Counsel
Department of Labor and Industries
100 Cambridge Street
Boston, MA 02202
617-727-3457

Dated: January 7, 1987

(5)

No. 88-32

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONER

JAMES M. SHANNON
Attorney General
Commonwealth of Massachusetts

MARC C. LAREDO*
Assistant Attorney General
Criminal Bureau
One Ashburton Place, Room 1811
Boston, Massachusetts 02108
(617) 727-2200 ext. 2818

*Counsel of Record

QUESTION PRESENTED

Whether the ERISA preemption provision bars a state from prosecuting an employer who fails to pay an employee for unused vacation time owed pursuant to the employer's agreement to make such payments out of the employer's general assets.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

No. 88-32

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 402 Mass. 287, 522 N.E.2d 409 (1988), and is reproduced in Appendix A to the Petition for a Writ of Certiorari.

JURISDICTION

The opinion and order of the Supreme Judicial Court for the Commonwealth of Massachusetts was entered on May 5, 1988. This Court has jurisdiction under 28 U.S.C. §1257(3) (1982).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461 (1982), provides in pertinent part:

> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital

> care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1135 of ERISA provides:

> Subject to subchapter II of this chapter and section 1029 of this title, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 1134(a) and (b) of this title).

Section 1144(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 1144(b)(4) of ERISA provides:

> Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Section 1144(c) defines certain terms used in section 1144 of ERISA:

> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

The applicable United States Department of Labor regulation, codified at 29 C.F.R. §2510.3-1(b) (1987), provides:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include - . . .
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example -
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

Mass. Gen. L. ch. 149, §148 (1986) provides, in pertinent part:

> Every person having employees in his service shall pay weekly each such employee the wages earned by him . . . and any employee discharged from such employment shall be paid in full on the day of his discharge. . . . The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

> The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section. . . . .
>
> Whoever violates this section shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars or by imprisonment in a house of correction for not more than two months, or both.1/

STATEMENT OF THE CASE

On May 29, 1986, two criminal complaints were issued in the Boston Municipal Court charging Richard N. Morash ("Morash"), president of the

---

1/ In 1987, after the complaints against Morash were filed, Massachusetts amended the last sentence of the statute as follows: "Whoever violates this section shall be punished by a fine of not less than five hundred nor more than three thousand dollars or by imprisonment in a house of correction for not more than two months, or both." Mass. Gen. L. ch. 149, §148 (Supp. 1987).

Yankee Bank for Finance and Savings, F.S.B., formerly known as Home Savings Bank, F.S.B., with failing to pay vacation wages to two former employees of the Bank, in violation of Mass. Gen. L. ch. 149, §148 (1986). Joint Appendix 1, 3-6 [hereinafter "J.A. (page)"].

On June 12, 1986, Morash pleaded not guilty. J.A. 1. On November 4, 1986, Morash filed a motion to dismiss. J.A. 1, 7-13. After a November 10, 1986 court hearing, the motion judge took the motion under advisement. J.A. 1.

On January 7, 1987, the motion judge reported a question of law to the Massachusetts Appeals Court pursuant to Mass. R. Crim. P. 34, 378 Mass. 842, 905-906 (1979). J.A. 1, 14-15.2/

2/ Under Mass. R. Crim. P. 34, a trial judge may report an important or doubtful question of law to the Massachusetts Appeals Court for decision.

The judge's report was as follows:

> The Commonwealth contends that the defendant in this case violated G.L. c. 149 §148 by failing to compensate the complainants, two former employees, for vacation time that they accrued but did not use. The defendant has filed a motion to dismiss, alleging that the Commonwealth cannot prosecute under this section because it is preempted by federal law. This motion raises an important question of law that, in my judgment, requires a decision from this Court. Therefore, I report the following question of law pursuant to Mass. R. Crim. P. 34:
>
> > Does the preemption provision, section 1144(a), of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. (ERISA), preclude prosecution of an employer who has allegedly violated c. 149, §148 by not compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement.

The parties prepared a stipulation of facts which was reported along with the question. J.A. 1, 16-21. The stipulation of facts was as follows:

The defendant in these cases, Richard N. Morash, ("Mr. Morash"), is the president of The Yankee Bank for Finance and Savings, F.S.B., formerly known as Home Savings Bank, F.S.B. (the "Bank"). In May, 1984 the Yankee Companies, Inc. acquired the stock of Home Savings Bank, F.S.B. Home Savings Bank had been in serious financial trouble and was threatened with a regulatory merger.

On May 29, 1986 Messrs. Christopher C. Winslow and William R. Tuttle ("the complainants"), each a former vice-president of the Bank, applied for and were granted criminal complaints in the Boston Municipal Court. Mr. Winslow alleged that the Bank discharged him on May 24, 1985, and that it owes him $14,520 for 66 unused vacation days. Mr. Tuttle alleged that the Bank discharged him on April 19, 1985, and that it owes him $11,146.38 for 42 unused vacation days. The Commonwealth contends that the Bank violated G.L. c. 149, §148 ("Section 148") by failing to compensate the complainants for vacation time they accrued but did not use.

The Commonwealth, through the Department of Labor and Industries (the "DLI"), is prosecuting these criminal complaints. The DLI and Mr. Morash agree that the following elements of the DLI's prima facie case are undisputed: (1) that the complainants were employed by the

Bank, (2) that the Bank terminated the complainants' employment relationships with the Bank and (3) that the Bank did not offer to pay the complainants the amount of vacation time that they claim they are owed (although it did offer to pay them for vacation time that they accrued after January 1, 1985).

The Question in these cases arises from Section 148's provision that where there is an oral or written agreement to compensate employees for vacation time, vacation pay constitutes wages. For the purposes of this Question only, it is agreed that the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time. Also for the purposes of this Question only, it is agreed that such agreements stem from handbooks, manuals, memoranda and practices. It is further agreed that when the Bank does pay its employees for used or unused vacation time, such payments are made out of the Bank's general assets.

On November 3, 1986 Mr. Morash moved to dismiss both complaints on the grounds that, in order for the DLI to prove a violation of Section 148, it must prove the existence of an oral or written agreement or policy to compensate employees for all unused vacation time. The defendant's contention is that proof

> of such an agreement or policy would constitute proof of a welfare benefit plan, which would fall within ERISA's exclusive jurisdiction. J.A. 16-21.

On January 15, 1987, the case was docketed in the Massachusetts Appeals Court. J.A. 1. On April 16, 1987, the Massachusetts Supreme Judicial Court, on its own initiative, accepted the case for direct appellate review, and, on April 24, 1987, it was docketed in the Supreme Judicial Court. J.A. 1; Mass. R. App. P. 11, 378 Mass. 924, 938-939 (1979).

On May 5, 1988, the Massachusetts Supreme Judicial Court answered the reported question as follows:

> Prosecution under G.L. c. 149, §148, of an employer who has failed to make agreed-upon vacation payments is preempted if the payments were to be made pursuant to an "employee benefit plan." Since the stipulated facts in this case establish the existence of an "employee benefit plan" pursuant to which payments for unused vacation should have been, but were not, made to discharged employees, prosecution of the defendant is preempted by ERISA.

Commonwealth v. Morash, 402 Mass. 287, 289, 297-298, 522 N.E.2d 409, 411, 416 (1988). The Supreme Judicial Court's decision terminated the prosecution of Morash. 402 Mass. at 298, 522 N.E.2d at 416.

SUMMARY OF ARGUMENT

I. ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans. One section of the statute provides that state laws that both relate to and purport to regulate an employee benefit plan are preempted. 29 U.S.C. §1144. By definition, only ERISA plans are preempted. 29 U.S.C. §1144.

Mass. Gen. L. ch. 149, §148 (1982) makes it a crime for any person to fail to pay wages, including vacation pay,

owed to an employee. The Bank, in the instant case, agreed to pay its employees for earned but unused vacation time. J.A. 19. The Bank's agreement is not a plan within the meaning of ERISA. Hence, the Massachusetts statute is not preempted.

The Bank's policy here, like the statute at issue in Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211 (1987), has none of the characteristics of a plan. There is no evidence in this case of any administrative scheme; the payments themselves come from the Bank's general assets. J.A. 20. The Bank need only compute the number of unused vacation days and pay its employees. In short, no plan is created.

This conclusion is supported by a United States Department of Labor regulation, which states that "payroll

practices," such as payment of compensation out of an employer's general assets while an employee is on vacation, do not constitute employee benefit plans. 29 C.F.R. §2510.3-1(b). Since the Bank's policy is to give its employees paid vacations, and the funds for that compensation come from the Bank's general assets, the Bank's policy falls squarely within the scope of the regulation.

If such practices are held to constitute an ERISA plan, then employers who agree to provide their employees paid vacations in the normal course of business out of their general assets will have to comply with the complex statutory requirements of ERISA. At the same time, preemption would leave employees with virtually no effective remedy against employers who do not make promised vacation payments because state wage

payment laws, including the weapon of criminal sanctions, will no longer be available.

II. Even if the Bank's agreement constitutes an ERISA plan, the Massachusetts statute must both "relate to" and "purport to regulate" that plan for the statute to be preempted. 29 U.S.C. §1144(a) and (c). In this case, the statute does neither. As this Court has recognized, some state actions may affect plans in too "tenuous, remote, or peripheral" a manner to "relate to" plans. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983). The Massachusetts statute does not affect the plan's administration or disclosure, funding or reporting requirements. It simply punishes employers for improperly withholding wages.

Nor does the Massachusetts statute "purport to regulate" the terms and

conditions of any plan. It does not contain any requirements, interpret any plan, or allow Massachusetts to issue orders. It cannot be said to "enforce" a plan because a successful prosecution of an employer does not result in the payment of any funds due to an employee. The Massachusetts statute neither "relates to" nor "purports to regulate" any ERISA plan and, consequently, the statute is not preempted.

III. ERISA's preemption provision does not apply to a state's "generally applicable criminal laws." 29 U.S.C. 1144(b)(4). The Massachusetts statute applies to every person who employs another person. It is not aimed at plans; it addresses the payment of wages generally. Accordingly, the Massachusetts statute, it is a generally applicable criminal law and hence exempt from ERISA's preemption provision.

ARGUMENT

I. BECAUSE ERISA PREEMPTS ONLY PLANS, AND THE BANK'S AGREEMENT TO MAKE CERTAIN VACATION PAYMENTS IS NOT AN ERISA EMPLOYEE BENEFIT PLAN, THE MASSACHUSETTS NONPAYMENT OF WAGES STATUTE IS NOT PREEMPTED BY ERISA IN THIS CASE.

A. Congress Did Not Intend That ERISA Preempt Traditional Areas Of State Regulation Such As The Massachusetts Nonpayment of Wages Statute.

ERISA "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983). One section of ERISA preempts, with certain exceptions discussed below, state laws insofar as they relate to and purport to regulate any employee benefit plan as the latter term is defined in the statute. 29 U.S.C. §1144(a). The question posed in this case is whether a

Massachusetts statute that makes nonpayment of wages a crime, Mass. Gen. L. ch. 149, §148 (1986), is preempted by section 1144.

In any preemption analysis, this Court must begin "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350, 1353 (1988) (citations omitted). "This assumption provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the court." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted). When determining whether ERISA preempts a state law, it is presumed "that Congress

did not intend to preempt areas of traditional state regulation." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state." DeCanas v. Bica, 424 U.S. 351, 357 (1976). Child labor laws, workmen's compensation laws, and wage laws are only a few examples of such protective state legislation. Id.

The Massachusetts statute's historical development makes it clear that Massachusetts has traditionally exercised its police powers in this area. In 1879, Massachusetts enacted the original version of Mass. Gen. L. ch. 149, §148, which governed wage payments made by cities. St. 1879, ch. 128; see

American Mut. Liab. Ins. Co. v. Comm'r of Labor & Indus., 340 Mass. 144, 146-147, 163 N.E.2d 19, 20-21 (1959) (discussing the history of the statute). In 1886, the statute was amended to require corporations to pay their employees on a weekly basis. St. 1886, ch. 87; American Mut., 340 Mass. at 146, 163 N.E.2d at 20. In 1895, individuals and partnerships became bound by the statute. St. 1895, ch. 438; American Mut., 340 Mass. at 146, 163 N.E.2d at 20-21.

In 1932, the statute was amended to impose criminal liability on corporate officers for a corporation's failure to pay wages. St. 1932, ch. 101, §1. In 1966, the definition of wages was inserted, making it clear that "wages" included holiday or vacation payments. St. 1966, ch. 319. Thus, the statute

clearly was not "hastily drawn" in any attempt indirectly to regulate ERISA plans. Cf. Shaw, 463 U.S. at 99-100 n.20 (quoting remarks of Sen. Javits).

Moreover, the Massachusetts statute is similar to statutes in numerous other states. Indeed, 48 states and the District of Columbia have statutes governing wage payments to employees, and over half of those laws specifically apply to vacation pay either through explicit mention in the statute or by judicial interpretation. See Petition for a Writ of Certiorari, Appendix B. Virtually all of the state statutes governing wage payments to employees were first passed before the enactment of ERISA. See Petition for a Writ of Certiorari, Appendix B.

Accordingly, the imposition by the states of criminal penalties for failure

to pay wages was indisputably well established when Congress enacted ERISA. In light of this prior and widespread exercise of state police powers, Congress must be presumed not to have intended to preempt state regulation in this area.

B. The Bank's Agreement To Make Certain Vacation Payments Does Not Constitute An ERISA Plan.

The Bank's agreement to pay employees for unused vacation time is not a plan. Hence, the Massachusetts statute that makes nonpayment of wages a crime is not preempted by ERISA.

The term "employee benefit plan," as defined in ERISA, encompasses both "pension" plans and "welfare" plans. 29 U.S.C. 1002(3) (1982). An "employee welfare benefit plan" is a

> plan, fund, or program . . . established or maintained . . . for the purpose of providing for its participants or their beneficiaries . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.

29 U.S.C. 1002(1) (emphasis added). In adopting ERISA, Congress was primarily concerned with remedying abuses in retirement and other benefit plans. See 29 U.S.C. §1001 (1982); S. Rep. No. 127, 93rd Cong., 1st Sess. 7, reprinted in 1974 U.S. Code Cong. & Admin. News 4838, 4840-4844, and in 1 Legislative History of the Employee Retirement Income Security Act of 1974 (hereinafter "Leg. Hist.") at 587, 589-93 (1976). In construing ERISA, this Court should "look to the provisions of the whole law, and to its object and policy." Pilot Life

Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 1555 (1987), quoting, Kelly v. Robinson, 479 U.S. 36, 43 (1986).

ERISA contains an array of requirements for providers of employee benefit plans. Every employee benefit plan must be in writing, and administered by fiduciaries. 29 U.S.C. §1102(a) (1982). All plans must have procedures for funding, plan operation, and methods of payment. 29 U.S.C. §1102(b) (1982). All assets of a plan, with certain exceptions, must be held in trust. 29 U.S.C. §1103 (1982). ERISA also imposes certain reporting and disclosure requirements and establishes fiduciary duties for plan managers. See 29 U.S.C.A. §§1021-1031, 1104-1113 (West 1985 and Supp. 1988). These complex requirements, however, only apply to employee benefit plans, because "ERISA's

pre-emption provision does not refer to state laws relating to 'employee benefits' but to state laws relating to 'employee benefit plans.'" Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211, 2215 (1987) (emphasis in original).

Morash might argue that simply because the Bank made "oral and/or written agreements . . . from handbooks, manuals, memoranda and practices . . ." to pay employees out of its general assets for unused vacation time, the Bank's agreement is an employee welfare benefit plan under ERISA.[3/]

3/ While Morash contends that the Bank's agreement is an ERISA plan, Morash does not claim that the Bank complied with ERISA's reporting, disclosure, and fiduciary requirements prior to raising the preemption defense. It is ironic that Morash now seeks to use ERISA as a shield from state law liability when, prior to the filing of these criminal

(footnote continued)

J.A. 19-20. Such an interpretation, however, would thwart Congressional intent. This Court has recognized that Congress intended the ERISA preemption provision to afford employers the advantages of being governed by a single set of procedures and regulations. Fort Halifax, 107 S. Ct. at 2217. "This concern only arises, however, with

---

(footnote continued)

complaints, neither the Bank nor Morash apparently believed that an ERISA plan had been created. Cf. Taggart Corp. v. Life & Health Benefits Admin., Inc., 617 F.2d 1208, 1211-1212 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) (no ERISA plan where employer never made any attempt to comply with ERISA's numerous requirements); Golden Bear Family Restaurants v. Murray, 144 Ill. App.3d 616, 621-623, 494 N.E.2d 581, 585-587 (1986) (no ERISA plan where requirements of ERISA not followed); but see Gilbert v. Burlington Industries, Inc., 765 F.2d 320, 323-325, 328, sum. aff'd, 477 U.S. 901 (1986) (employer not estopped from raising defense of preemption even though it did not comply with requirements of ERISA).

respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to plans, rather than simply to benefits." Id. (emphasis in original).

The Bank policy at issue here does not, by nature, have the characteristics of a plan. No administrative scheme beyond routine recordkeeping or bookkeeping procedures is necessarily required, nor does the Bank necessarily assume the responsibility of paying benefits on a regular basis. Cf. Fort Halifax, 107 S. Ct. at 2218. Those employees who use all of their paid vacations while still in the Bank's employ presumably are paid in the normal course of business, just as they are paid their wages on a regular basis. Nothing

is owed to such employees when their employment is terminated.

Morash does not claim that the Bank assumes different responsibilities for employees, such as the complainants, who do not use all of their vacation time prior to termination. For such employees, the Bank presumably simply computes the number of unused vacation days (just as it totals the number of hours or days worked in calculating other wages) and pays the employees. Finally, and perhaps most importantly, all payments come from the Bank's general assets. J.A. 20. As this Court has aptly stated, "[t]o do little more than write a check hardly constitutes the operation of a benefit plan." Fort Halifax, 107 S. Ct. at 2218.

C. The Department Of Labor's Regulation Confirms That The Bank's Agreement To Make Vacation Payments Is A "Payroll Practice" And Not An ERISA Plan.

The Department of Labor's regulation buttresses the conclusion that the Bank's agreement in this case to pay employees for unused vacation time is not an ERISA welfare benefit plan. The Secretary of Labor is expressly authorized "to prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter [ERISA]. Among other things, such regulations may define accounting, technical and trade terms used in such provisions...." 29 U.S.C. §1135 (1982). "Because Congress explicitly delegated authority to construe the statute by regulation, . . . [this Court] . . . must give the regulations legislative and hence

controlling weight unless they are arbitrary, capricious or plainly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984). Insofar as "vacation benefits" are undefined in the statute and the Secretary of Labor was given the authority to prescribe standards, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-844 (1984).[4/]

Pursuant to this authority, the Secretary of Labor promulgated regulations defining ERISA coverage. Among other things, the Secretary of Labor determined that certain "payroll

---

4/ Indeed, Morash has not questioned the validity of the regulation.

practices" were not an ERISA plan. 29 C.F.R. 2510.3-1 (1987). Included in these "payroll practices" were "[p]ayment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons," out of an employer's general assets. 29 C.F.R. §2510.3-1(b)(3) (1987). This regulation is entitled to particular weight because it was formulated by the agency charged with administering ERISA, and the regulation was created contemporaneously with the passage of the statute.[5/]

5/ On December 4, 1974, soon after ERISA became law, the Secretary of Labor announced that he would issue regulations to make clear that certain employer practices, such as vacation pay, would

(footnote continued)

See Watt v. Alaska, 451 U.S. 259, 272-73 (1981); see also Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 262 (1985) (interpretation of agency charged with administration of statute entitled to substantial deference).[6/]

(footnote continued)

not be subject to the Act. 39 Fed. Reg. 42,236 (December 4, 1974). The Secretary of Labor subsequently concluded that "payroll practices" such as paid vacations were beyond the scope of ERISA "because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for these reforms in Title I [of ERISA] were not in this area and there is no indication that Congress intended to subject these practices to Title I coverage." 40 Fed. Reg. 24,642-24,643 (June 9, 1975).

6/ The Department of Labor, in several opinion letters, has expounded upon 29 C.F.R. §2510.3-1. The Department has explained that once vacation payments are placed into separate funds or into separate accounts with restrictions on removal, the payments are not "payroll

(footnote continued)

The Massachusetts Supreme Judicial Court, in its opinion below, acknowledged the existence of the Department of Labor regulation, but misperceived its meaning. The court held that the regulation applies only to an employer's payment of compensation out of general assets to an employee "while he or she is on vacation, ... [and] does not apply to the present case which involves a lump-sum payment for unused vacation time upon discharge." Commonwealth v. Morash, 402 Mass. at 290-291, 522 N.E.2d at 412 (emphasis in original; citations omitted). This characterization of the

---

(footnote continued)

practices" but rather vacation benefit plans subject to ERISA. See, e.g., Department of Labor ERISA Opinion Letter No. 77-84A (Nov. 7, 1977); Department of Labor ERISA Opinion Letter No. 81-55A (June 26, 1981). Here, of course, Morash has stipulated that payments are made from the Bank's general assets. J.A. 20.

Department of Labor's regulation is inconsistent with both its purpose and content.

The fundamental distinction drawn by the Department of Labor's regulation is between vacation pay on the one hand and severance pay on the other. The Supreme Judicial Court apparently concluded that simply because the payments to the complainants were due after their employment terminated, the payments were more akin to severance pay than to ordinary wages and therefore the Department of Labor regulation does not apply. Morash, 402 Mass. at 291, 522 N.E.2d at 412. This analysis is unpersuasive. The vacation pay owed by the Bank is neither contingent upon, nor intended to compensate for, termination

of employment.[7/] Hence, vacation pay is quite different from the severance pay at issue in Holland v. Burlington Industries, Inc., 772 F.2d 1140 (4th Cir. 1985), sum. aff'd, 477 U.S. 901 (1986) and Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2d Cir. 1985), sum. aff'd, 477 U.S. 901 (1986).[8/]

7/ The Bank's policy is simple. It has agreed to give its employees paid vacations. J.A. 19. The money for these vacations comes out of the Bank's general assets. J.A. 20; Cf. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 4-5 (1983). On its face, this arrangement is no different from the procedure for paying employees their weekly wages.

8/ Severance pay and vacation pay are logically distinct. See, e.g., M. Miller, Comprehensive GAAP (Generally Accepted Accounting Principles) Guide 1988 §§8.16-8.19 (1987). Accrued vacation pay is payable whether an employee quits, is fired, retires or dies. See Evans v. Unemployment Ins. Appeals Bd., 39 Cal.3d 398, 414-415, 216 Cal. Rptr. 782, 790, 703 P.2d 122, 130 (1985) (en banc). "A vacation with pay is in effect additional wages." In Re

(footnote continued)

Furthermore the Supreme Judicial Court's

(footnote continued)

Wil-Low Cafeterias, 111 F.2d 429, 432 (2d Cir. 1940). In contrast, severance pay is defined as "[p]ayment by an employer to employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault...." Black's Law Dictionary 1232 (5th ed. 1979); see, e.g., Gilbert v. Burlington Industries, 765 F.2d at 325 ("severance pay is an unemployment benefit"). Since vacation pay is no more than deferred income, for accounting purposes it is treated very differently than severance pay, which requires an extra outlay of funds above and beyond ordinary wages. M. Miller, Comprehensive GAAP (Generally Accepted Accounting Principles) Guide §§8.16-8.19; Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702, 1720 (1987). Moreover, the amount of money associated with severance pay is likely to be much larger than that involved in vacation pay because the former accumulates every year the employee is with the employer. 87 Colum. L. Rev. at 1720. "Because of the large sums of money involved and the length of time the employer will hold the money for the employee, problems of fraud and misuse of funds are likely to occur regardless of the employer's source of funds." Id. Significantly, the Department of Labor does not classify severance pay as a "payroll practice." 29 C.F.R. §2510.3-1(b) (1987).

reasoning leads to the anomalous result that an employer who regularly pays employees for unused vacation time just prior to their discharge would not create an ERISA plan, while another employer who failed to make such payments but held vacation pay until after employment was terminated would create an ERISA plan.

The carryover provision in the Bank's vacation policy is obviously designed to permit the Bank to have its employees defer their vacations without forfeiting their vacation pay. This type of option cannot be said to transform the Bank's vacation policy into an ERISA plan or to take the plan out of the reach of 29 C.F.R. §2510.3-1(b). The regulation permits employers to provide paid vacations and induce employees to take vacations at certain times without

creating an ERISA plan. The Bank here agreed to provide paid vacations and promised its employees payment in lieu of unused vacation time. This is exactly what the Department of Labor determined is a "payroll practice." As long as a vacation policy is primarily designed to provide regular paychecks to employees who are on vacation and is funded from an employer's general assets, it falls within the exclusion defined in 29 C.F.R. §2510.3.

Nor does Department of Labor's regulation deprive the term "vacation benefits" of meaning. For example, funding vacations by any means other than out of an employer's general assets is not a payroll practice and therefore is a plan under ERISA. Mackey v. Lanier Collections Agency & Service, 108 S. Ct. 2182, 2184 (1988); Franchise Tax Bd. v.

Construction Laborers Vacation Trust, 463 U.S. 1, 4-5 (1983). In Mackey, the petitioners were trustees of a plan that provided vacation and holiday benefits to eligible employees in several states. Mackey, 108 S. Ct. at 2184. There was no question that the scheme at issue was a plan. Likewise, in Franchise Tax Board, the vacation benefits plan was "set up in large part because union members typically work for several employers during the course of a year." Franchise Tax Bd., 463 U.S. at 4 n.2. Again, this arrangement was clearly an ERISA plan and, indeed, an example of a true vacation benefit plan, the type ERISA was meant to govern.

The Department of Labor has made a similar distinction for an arrangement whereby employees entered into an irrevocable agreement under which

vacation wages could be deferred for payment in annual installments, with interest, after severance. Department of Labor ERISA Opinion Letter No. 81-55A (June 26, 1981). The differences between that plan and the agreement in this case are obvious. Here, there is no irrevocable agreement to defer payment beyond the date of termination, no interest payments, and no intent that vacation pay function as severance pay. Thus, the Department of Labor created a sensible distinction between "payroll practices" and "plans."

D. The Legislative History And Policies Underlying ERISA Clearly Demonstrate That The Bank's Agreement Is Not An ERISA Plan.

ERISA's legislative history is silent with regard to whether Congress intended to preempt state regulation of vacation

pay. See Note, Unfunded Vacation Benefits: Determining the Scope of ERISA, 87 Colum. L. Rev. 1702, 1708-1711 (1987). Congress, in adopting ERISA, was primarily concerned with regulating private pension plans and correcting the abuses associated with such plans. See, e.g., 120 Cong. Record 29,933-29,934 (Aug. 22, 1974) (statement of Sen. Javits), reprinted in 3 Leg. Hist. at 4747-4751; 120 Cong. Record 29,944-29,947 (Aug. 22, 1974) (statement of Sen. Humphrey), reprinted in 3 Leg. Hist. 4776-4777; 119 Cong. Record 30,003 (Sept. 18, 1973) (statement of Sen. Williams), reprinted in 2 Leg. Hist. 1598-1600; California Hosp. Ass'n v. Henning, 770 F.2d 856, 859 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986). Because the focus was on pension plans, there was no discussion of the effect of preemption on

vacation payments. 87 Colum. L. Rev. at 1710. Indeed, as one commentator has noted, "[t]he purpose of the legislation was to increase protection to employees; a provision to lessen protection would have received more comment." Id. Moreover, Congress must have been aware that vacation benefit plans or funds had historically been the practice in certain industries, such as construction and longshoring, where employees often work for several employers during the course of a year. Franchise Tax Bd., 463 U.S. at 4. It was these types of plans that Congress intended to control because these plans were potential targets for abuse and mismanagement.

Although, as noted, the legislative history of ERISA is silent as to the meaning of vacation benefit plans, it is clear that Congress was concerned with

providing greater protection to employees and their beneficiaries. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1981). By ruling that the Bank's agreement is not an ERISA plan, this Court would further that Congressional goal.

Most full-time employees in the United States receive paid vacations. United States Chamber of Commerce, Employee Benefits 1986 at 21 (1987) (86 percent of employees in the United States offered payments for or in lieu of vacation in 1986). Often, employees defer taking of some or all of their vacations, and vacation pay, during the course of their employment. This arrangement may benefit employers, who do not have to do without a vacationing employee, and employees, who receive payment for unused vacation time.

A determination that an agreement such as the Bank's constitutes an ERISA plan would impose the complex statutory requirements of ERISA on employers, large or small, who ask or agree to have an employee defer his or her vacation. As this Court recognized in Fort Halifax, preemption was designed to give employers the advantage of a uniform set of administrative procedures, but only with respect to benefits whose provision by nature require an ongoing administrative program. Fort Halifax, 107 S. Ct. at 2217. A ruling that the Bank's policy is an ERISA plan will have the effect of increasing the employer's burden with no comparable benefit to the employees.

If routine vacations with pay are ERISA plans, any employee claiming a denial of vacation pay could sue his or

her employer in federal court. 29 U.S.C. §1132(a). The federal courts could well be faced with the "substantial and needless burden," Henning, 770 F.2d at 861, of having "a host of trivial cases [brought] into the federal courts." Nat. Metalcrafters Div. of Keystone v. McNeil, 784 F.2d 817, 823 (7th Cir. 1986).

At the same time, if arrangements such as the Bank's are deemed plans, employees will be left with virtually no swift and effective remedy against employers who refuse to honor agreements. The vast majority of complaints regarding vacation pay do not arise until the conclusion of the employment relationship; an employee who defers his vacation usually will not seek compensation for the unused time until there is no longer an opportunity to use

it. See, e.g., Shea v. Wells Fargo Armored Service Corp., 810 F.2d 372, 374, 378 (2d Cir. 1987) (former employees' claims for vacation pay brought after termination). If vacation deferment policies such as the Bank's are ERISA plans, employees will not be able to rely on state wage payment laws for assistance. The potent and cost-effective weapon of criminal sanctions will no longer be available for the individual employee. Such employees will be virtually without any practical recourse. Employees situated as the complainants are here would actually be less protected than they would have been if ERISA had never been enacted; this is hardly the result that Congress intended. 87 Colum. L. Rev. at 1715.

II. EVEN IF THE BANK'S AGREEMENT TO PAY EMPLOYEES FOR UNUSED VACATION TIME CONSTITUTES AN ERISA PLAN, THE MASSACHUSETTS STATUTE IS NOT PREEMPTED BY ERISA BECAUSE IT DOES NOT "RELATE TO" ANY PLAN NOR "PURPORT TO REGULATE" ERISA PLANS.

A. A State Law Must Both "Relate To" An ERISA Plan And "Purport To Regulate" ERISA Plans Before It Can Be Held To Be Preempted.

As the Court of Appeals for the Ninth Circuit has observed, "The structure of [29 U.S.C. §1144] is somewhat unusual." Martori Bros. Distributors v. James-Massengale, 781 F.2d 1349, 1359 n.20 (9th Cir.), mod. 791 F.2d 799 (9th Cir., cert. denied, 479 U.S. 949, 1018 (1986). Section 1144(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Section 1144(c)(1) defines "State law," so far as here pertinent, as the "laws . . . of any

State." Section 1144(c)(2), in turn, defines "State" as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans. . . ." The foregoing provisions, when read in concert, require that a state law must both "relate to" an ERISA plan and "purport to regulate" ERISA plans before it can be held to be preempted by the federal scheme. Martori Bros. Distributors v. James-Massengale, 781 F.2d at 1359; Rebaldo v. Cuomo, 749 F.2d 133, 137 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985); Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984). Cf. Alessi v. Raybestos- Manhattan, Inc., 451 U.S. 504, 525 (1981) (phrase "directly or

indirectly" modifies both "State" and "agency or instrumentality").[9/]

B. The Massachusetts Statute Does Not "Relate To" An ERISA Plan.

This Court has stated that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Addressing the latter option first, it is apparent that the Massachusetts statute makes no mention whatsoever of any ERISA plan

---

9/ Moreover, where the challenged state provision is "an exercise of a State's police powers, which should not be superseded by federal regulations unless that was the clear intent of Congress[,] [citations omitted] [the state law] should not be found to 'relate' to 'the terms and conditions of employee benefit plans' unless this conclusion is unavoidable." Rebaldo v. Cuomo, 749 F.2d at 138 (citation omitted; emphasis added).

(indeed, as discussed above, the statute was first enacted nearly a hundred years before the passage of ERISA). The statute thus cannot be said to have been "specifically designed to affect employee benefit plans" and it certainly does not "single ERISA plans out" for any "special treatment." Cf. Mackey v. Lanier Collections Agency & Service, 108 S. Ct. 2182, 2185, 2189 n.12 (1988) (specific Georgia statute barring garnishment of ERISA plan funds preempted; general state garnishment law not preempted). Hence, the Massachusetts statute does not make "reference to" an ERISA plan.

Nor can it be demonstrated that the Massachusetts statute has a "connection with" an ERISA plan within the meaning of Shaw. While the phrase "connection with" is admittedly broad, this Court has

recognized that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n.21. The Massachusetts statute does not affect the administration of any plan. Mass. Gen. L. ch. 149, §148 has nothing whatsoever to do with disclosure, funding or reporting requirements. Nor does it potentially subject a plan to multiple orders under varying or conflicting state laws. Cf. Mackey, 108 S. Ct. at 2192 (Kennedy, J., dissenting).[10/] As discussed above,

---

10/ Indeed, the state statute by definition applies to employers, not plans or trustees or administrators of plans. Thus, holding an employer liable does not place any fiscal or administrative burden on a plan itself. Teper v. Park West Galleries, Inc., 431 Mich. 202, 215-16, 427 N.W.2d 535, 541 (1988) (damage award based on terms of

(footnote continued)

Mass. Gen. L. ch. 149, §148 simply makes it a crime for employers to improperly withhold workers' wages. It does not "relate to" an ERISA plan within the meaning of 29 U.S.C. §1144(a).

C. The Massachusetts Statute Does Not "Purport To Regulate" ERISA Plans.

As noted above, and as explained by the Court of Appeals for the Ninth Circuit:

> Congress further limited the preemptive effect of ERISA in the definitional section, 29 U.S.C. §1144(c)(2), wherein it is established that the term "State" for

---

(footnote continued)

ERISA plan but not levied against plan or administrators too "peripheral" to trigger ERISA preemption; "it does not relate to a pension plan within the meaning of the ERISA"). As the Teper court held, "ERISA preemption... turns upon whether state law places any fiscal, administrative, or legal burdens upon the plan." Teper, 431 Mich. at 218, 427 N.W.2d at 542. Pursuit of a remedy against an employer does not create a fiscal, administrative, or legal burden upon a plan.

> preemption purposes includes a state or its political subdivisions or agencies of either, "which purports to regulate, directly or indirectly, the terms and conditions of employee benefits plans covered by this subchapter."

Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984). See Rebaldo v. Cuomo, 749 F.2d 133, 137 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985) ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA). Cf. Teper v. Park West Galleries, Inc., 431 Mich. 202, 225, 427 N.W.2d 535, 546 (Riley, C.J., concurring) (plaintiff's jury award not preempted since it in no way "purports to regulate" any term or condition of a plan).

At the outset, it should be noted that because a challenged state provision must both "relate to" a plan and "purport to regulate" ERISA plans before it is preempted, if the Court determines that the Massachusetts statute does not

"relate to" any plan, it need not reach the "purport to regulate" question.[11/] Similarly, if the Court rules that the state law does not "purport to regulate" ERISA plans, it need not address the "relate to" question.

While this Court has on several occasions construed the "relate to" language in ERISA, it has never examined the "purport to regulate" requirement of the statute's preemption provision. The phrase itself is undefined in the

---

11/ By the same token, "[a]s a logical matter, if a state law does not 'relate to' ERISA plans, it cannot 'purport to regulate' them, for 'relates' includes, but is much broader than, 'purports to regulate.'" Martori Bros. Distributors v. James-Massengale, 781 F.2d at 1359. In other words, if the state law does not 'relate to any employee benefit plan," a fortiori, it does not "purport to regulate" ERISA plans. Id.

statute. Consequently, guidance must be found elsewhere.[12/]

In Lane v. Goren, the Ninth Circuit stated that for a state provision to "purport to regulate" ERISA plans, "the state statute must atttempt to reach in one way or another the 'terms and conditions of employee benefit plans.'" 743 F.2d at 1339.[13/] The issue in Lane

---

12/ Black's Law Dictionary defines "regulate" as "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1156 (5th ed. 1979). Applying that definition, it seems clear that the Massachusetts statute does not purport "to regulate" -- certainly not in the accepted sense of establishing or implementing systematic guidelines or controls in a general area of governmental concern.

13/ In a similar vein, several commentators have suggested that in analyzing whether a statute relates to and purports to regulate a plan, a court

(footnote continued)

was whether certain California statutes prohibiting employment discrimination were preempted by ERISA. The court held that preemption was not appropriate and analyzed the matter, with respect to the "purport to regulate" issue, as follows:

> We find that the state statutes in no way regulate the "terms and conditions" of an ERISA plan. We reach this conclusion without giving the phrase "terms and conditions" a narrow interpretation. ERISA imposes participation, funding, and vesting requirements on pension plans. . . . It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. . . . ERISA also provides for the fair and proper handling and disposition of benefit claims. . . . For purposes of this case we assume that the phrase "terms and conditions" of benefit plans encompasses all these areas. The California statutes in question in no way purport to reach any of them. They merely prohibit employers from discriminating against employees on the basis of age, race, sex, or religion.

743 F.2d at 1340 (citations omitted). Likewise, the Massachusetts statute does not purport to reach any "terms and conditions" of benefit plans; it merely punishes employers for unlawfully failing to pay wages.

In Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984), cert. denied, 472 U.S. 1008 (1985), the Second Circuit rejected the contention that New York's promulgation of hospital rate schedules was preempted by ERISA. The court noted that "a state law must 'purport[] to regulate, . . .

(footnote continued)

should ask whether a state intended to regulate the terms and conditions of plans. See, e.g., W. Kilberg and P. Inman, Preemption of State Law Under ERISA: Drawing The Line Between Laws That Do and Laws That Do Not Relate To Employee Benefit Plans, 19 Forum 162, 172 (1983); Comment, ERISA Preemption of State Vacation Pay Laws: California Hospital Association v. Henning, 16 Loy. U. Chi. L. J. 387, 399 (1985).

the terms and conditions of employee benefit plans' to fall within the preemption provision[,]" 749 F.2d at 137, and ultimately held that "[w]here, as here, a State statute of general application does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." 749 F.2d at 139. The Massachusetts statute similarly "does not affect the structure, administration, or type of benefits provided by an ERISA plan."[14/]

14/ The Rebaldo court also made a separate, and more general, point which is worthy of note. The court stated that "[a] preemption provision designed to prevent state interference with federal

(footnote continued)

In its opinion below, the Supreme Judicial Court held that the criminal statute satisfied the "purport to regulate" requirement for preemption. 402 Mass. at 295, 522 N.E.2d at 414-415.[15/] The court concluded

---

(footnote continued)

control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction." 749 F.2d at 138. It is submitted that while the preemption provision was designed to prevent state interference, the "purport to regulate" requirement works to assure that only those state provisions which might "interfere" are preempted. In this regard, it is significant that the Massachusetts statute in no way conflicts with any of the regulatory provisions of ERISA.

15/ The court relied heavily upon Cairy v. Superior Court, 192 Cal. App.3d 840, 843, 237 Cal. Rptr. 715 (1987). The status of the Cairy holding, however, is unclear since the California Supreme Court recently granted further review in a similar case. Carpenters Southern Cal. Admin. Corp. v. El Capitan Dev. Co., 197 Cal. App.3d 790, 243 Cal. Rptr. 132, 135-136, further rev. granted, 246 Cal. Rptr. 209, 753 P.2d 1 (1988).

that because "the power to regulate includes the power to enforce," the Massachusetts law regulated the Bank's plan. 402 Mass. at 295, 522 N.E.2d at 414-415 (citation omitted). However, the court's conclusion is erroneous on a number of grounds. First, and perhaps foremost, this conclusion ignores the fact that the statute does not enforce agreements; it merely punishes individuals who do not make payments. A successful prosecution of an employer does not result in the payment of any funds due to an employee. The employer is punished, but the agreement (or plan) is not "enforced."

Moreover, the Supreme Judicial Court's analysis ignores the criteria for "purporting to regulate" as they are suggested by the authorities discussed herein. To reiterate and conclude, the

Massachusetts statute is silent as to the terms and conditions of vacation plans. It does not contain or address any disclosure, funding or reporting requirements. Nor does it affect the structure, administration, or type of benefits provided by any plan. In enforcing the statute, Massachusetts does not interpret plans, nor can it issue orders regulating plans. The only function conferred by the statute is the prosecution of an employer for not paying wages owed to an employee. The statute simply does not "purport to regulate" ERISA plans, and, accordingly, preemption is inappropriate.

III. THE MASSACHUSETTS STATUTE IS NOT PREEMPTED BY ERISA BECAUSE THE STATE PROVISION IS A "GENERALLY APPLICABLE CRIMINAL LAW."

Section 1144(b)(4) of ERISA provides that the preemption clause, section

1144(a), shall not apply to "any generally applicable criminal law of a State." 29 U.S.C. §1144(b)(4). Petitioner submits that the Massachusetts nonpayment of wages statute is a "generally applicable criminal law" within the meaning of ERISA, and, accordingly, the state law should not be preempted.

The term "generally applicable criminal law" is not defined in ERISA, nor has it ever been construed by this Court.[16/] The lower courts which have undertaken to construe the phrase have

---

16/ However, in New York Telephone Co. v. New York Labor Dept., 440 U.S. 519, 533 (1979), a plurality of this Court ruled that a New York statute which authorized the payment of unemployment benefits to striking workers was "a law of general applicability," and not one "regulating the relations between employees, their union, and their employer." Accordingly, the Court held, the state provision was not preempted by the National Labor Relations Act or the Social Security Act.

typically done so with little exposition or analysis, and no uniform standard for the inquiry has been developed.[17/]

17/ See, e.g., Upholsterer's Internat. Union v. Pontiac Furniture, 647 F. Supp. 1053, 1056-1057 (C.D. Ill. 1986) (Illinois Wage Payment and Collection Act not preempted); Goldstein v. Mangano, 99 Misc.2d 523, 531-532, 417 N.Y.S.2d 368, 373-375 (1978) (criminal wage law not preempted); Sasso v. Vachris, 116 Misc.2d 797, 799-802, 456 N.Y.S.2d 629, 632-633 (1982), mod. on other grounds, 106 A.D.2d 132, 482 N.Y.S.2d 875 (1984), rev. on other grounds 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985) (New York criminal wage statute not preempted); People v. Art Steel Co., Inc., 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986) (New York wage statute is preempted); Commonwealth v. Federico, 383 Mass. 485, 490-491, 419 N.E.2d 1374, 1378 (1981) (Massachusetts statute aimed specifically at employee benefit plans is preempted); Sforza v. Kenco Constructional Contracting, Inc., 674 F.Supp. 1493, 1494-1496 (D.Conn. 1986) (criminal statute for failure to contribute to health and welfare plans is preempted); State v. Burten, 219 N.J. Super. 339, 348-51, 530 A.2d 363, 368-370 (1986), aff'd, 219 N.J.Super 156, 530 A.2d 30 (1987) (New Jersey criminal statute requiring contributions to pension plans is preempted).

The question whether a state provision is a "generally applicable criminal law" presents little difficulty in what might be termed extreme cases. That is, there can be no doubt that criminal laws against larceny and embezzlement, for example, are generally applicable criminal laws. E.g., Commonwealth v. Federico, 383 Mass. 485, 490, 449 N.E.2d 1374, 1377 (1981). By the same token, it seems clear that a statute which facially and specifically applies to employee benefit plans, or pension plans, is not a generally applicable criminal law within the meaning of 29 U.S.C. §1144(b)(4). Id. Between these extremes, however, there is no consensus, in part, no doubt, because of the absence of any prevailing standard controlling the inquiry.

Any standard to be crafted and applied in this area must take into account, on the one hand, that Congress did not intend to preempt areas of traditional state regulation, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985); that the states have broad police powers, including the power to protect employees through wage laws, DeCanas v. Bica, 424 U.S. 351, 356 (1976); and that the exercise of federal supremacy is not to be lightly presumed. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); see L. Tribe, American Constitutional Law 499-500 (2d ed. 1988). Any such "test" must also reflect, on the other hand, that Congress intended through the ERISA preemption provision to prevent state interference with federal regulation in the area.

Petitioner submits that the following proposed mode of analysis balances the foregoing considerations. A statute is a "generally applicable criminal law" within the meaning of §1144(b)(4) if (a) it applies to a broad or general class of prospective defendants, and (b) the nature of the conduct or subject matter which it addresses is sufficiently general to negate concern that use of the statute will necessarily interfere with federal regulation of ERISA plans.

Some lower courts have previously focused on the generality of the class issue. Two New York courts, for example, have held that "[a] generally applicable criminal law is one which extends to the entire state and embraces all persons or things of a particular class" and, therefore, a New York statute which makes it a crime to fail to make certain

payments to employees is a generally applicable criminal law. Sasso v. Vacharis, 116 Misc.2d 797, 800-801, 456 N.Y.S.2d 629, 632 (1982); Goldstein v. Mangano, 99 Misc. 523, 531-532, 417 N.Y.S.2d 368 (1978).

The Massachusetts statute applies to "[e]very person having employees in his service . . ." Mass. Gen. L. ch. 149, §148 (emphasis added). Every employer in Massachusetts, from a sole proprietor with one employee to the president of a multinational corporation, is bound by the statute. The statute is thus "generally applicable" at least with respect to the scope of the class of prospective defendants subject to its provisions.

Moreover, the nature of the conduct or subject matter which the statute addresses (nonpayment of wages) is

sufficiently general to negate concern that use of the statute would necessarily interfere with federal regulation of ERISA plans. The statute is not "aimed at" employee benefit plans; it addresses wages, not ERISA plans.

In its opinion below, the Supreme Judicial Court, while acknowledging that the statute was not aimed specifically at employee benefit plans, held that it was not within the exception for generally applicable criminal laws. 402 Mass. at 296-297, 522 N.E.2d at 415-416. The court concluded that "[b]ecause our statute is limited to the nonpayment of 'wages' by an employer to an employee, including agreed-upon vacation payments which will often be funded from 'employee benefit plans,' prosecution under the statute is not saved from preemption by the exception for 'generally applicable

criminal laws.'" 402 Mass. at 297, 522 N.E.2d at 416.

The court's analysis is fundamentally and demonstrably flawed. The dispositive question cannot be whether a particular statute might be applied in a factual context which implicates employee benefit plans. If that were the critical inquiry, a general larceny statute would not be a generally applicable criminal law, because it might well be employed to prosecute theft from plans. This is hardly what Congress intended nor what the courts have held.

The issue, thus, must not be the potential "reach" of a statute into the ERISA domain. Rather, the proper inquiry is addressed to the nature of the statute as dictated by its terms. The issue, in effect, reduces to a single question: Is this statute so facially specific that it represents such a necessary threat to

ERISA regulation that it can be said with confidence that Congress intended that it be preempted? The answer, with respect to the Massachusetts nonpayment of wages law, is "no." The provision is a "generally applicable criminal law" within the meaning of ERISA, and as a consequence, it must not be preempted.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Judicial Court should be reversed.

Respectfully submitted,

JAMES M. SHANNON
Attorney General
Commonwealth of Massachusetts

Marc C. Laredo
Assistant Attorney General
Criminal Bureau
One Ashburton Place, Room 1811
Boston, Massachusetts 02108
(617) 727-2200 ext. 2818

Date: November 23, 1988

(9)

No. 88-38

In The
Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
RICHARD N. MORASH,
Respondent.

On Writ of Certiorari
to the Supreme Judicial Court
for the Commonwealth of Massachusetts

BRIEF FOR RESPONDENT

Jason Burgess*
Marcia E. Greenberg
Theta, Hurwitz & Theriault
53 State Street
Boston, MA 02109
(617) 367-7500

*Counsel of Record

CICKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether an employer's agreement, which allowed employees to accrue unused vacation time and receive payment for such vacation time upon termination, constituted an "employee welfare benefit plan" under Section 3(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002.

2. Whether the Massachusetts Non-Payment of Wages Statute relates to an "employee welfare benefit plan" under Section 3(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.

3. Whether prosecution under a Massachusetts criminal statute that penalizes employers for refusal to pay vacation benefits under an "employee welfare benefit plan" is preempted by the broad preemption provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), or rather is saved from preemption by Section 514(b)(4) of that Act, 29 U.S.C. § 1144(b)(4), that excepts generally applicable criminal laws of a state from preemption.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

* Because the official United States reporters for these cases are not available, Respondent's references are to the Supreme Court Reporter.

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

At issue in this case is a decision of the Massachusetts Supreme Judicial Court, *Commonwealth v. Morash*, 402 Mass. 485, 419 N.E.2d 409 (1988), holding that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., preempts a Massachusetts statute, Mass. Gen. L., ch. 149, § 148, as it relates to vacation benefit plans under oral or written agreements. This brief is submitted in support of the Massachusetts court's holding.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Employee Retirement Income Security Act:

Section 3. *For purposes of this title:*

> (1) *The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund or program* which was . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, . . . (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits,* apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002 (emphasis added).

Section 514. *Effect on Other Laws:*

> (a) [T]he provisions of this title . . . *shall supercede any and all state laws* insofar as they may now or hereafter *relate to any employee benefit plan* . . . .

(b)(4) Subsection (a) of this section shall not apply to any *generally applicable criminal law* of a State.

29 U.S.C. § 1144 (emphasis ~~added~~).

Labor-Management Relations Act:

Section 302(c). *Restrictions on Financial Transactions:*

(c) Exceptions

The provisions of this section shall not be applicable . . . (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, . . . (6) with respect to money or other thing of value paid by any employer to a *trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits*, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships . . . or (B) child care centers . . . (8)

with respect to money or any other thing of value paid by any employer to a trust fund . . . for the purpose of defraying the costs of legal services for employees, their families, and dependents . . .

29 U.S.C. § 186 (emphasis added).

Department of Labor "Payroll Practices" Regulation:

(b) *Payroll practices.*

[T]he terms *"employee welfare benefit plan"* and "welfare plan" *shall not include*—

. . .

(3) Payment of compensation, out of the employer's general assets, *on account of periods of time during which the employee*, although physically and mentally able to perform his or her duties and not absent for medical reasons . . . *performs no duties;* for example—

(i) Payment of compensation *while an employee is on vacation* or absent on a holiday . . .

29 C.F.R. § 2510.3-1(b) (1987) (emphasis added).

Massachusetts Nonpayment of Wages Statute:

The word "wages" shall include any holiday or *vacation payments* due an employee *under an oral or written agreement.*

Mass. Gen. L., ch. 149, § 148 (1982) (emphasis added).

STATEMENT OF THE CASE

In May, 1984, The Yankee Companies, Inc. acquired the stock of Home Savings Bank, which was experiencing serious financial difficulties. The Yankee Companies installed Respondent, Richard N. Morash, as President and

changed the bank's name to Yankee Bank for Finance and Savings (hereinafter the "Bank"). (J.A. 17)[1]

Approximately one year later, the Bank terminated the employment of two former Home Savings Bank vice-presidents who had remained vice-presidents of the Bank after the acquisition. Upon their termination, the vice-presidents claimed that the Bank had a policy or practice of allowing employees to accumulate unlimited numbers of unused vacation days, and to receive a lump-sum payment for such banked vacation time upon separation. Under such practice, employees could earn vacation time in 1984, for example, and then receive payment for their unused 1984 time upon termination of employment in 1988 at their 1988 salary or wage rate. Thus, if an employee's wage rate rose from ten dollars an hour in 1984 to twenty dollars an hour in 1988, the value of the unused days would increase by one hundred percent. In addition, employees would be taxed on the value of the vacation time in the year of termination, when they received payment, rather than in the year in which the vacation time was earned.

The vice-presidents claimed they had saved 66 and 42 unused vacation days, respectively, and demanded payments of approximately $14,500 and $11,000. (J.A. 18) When the Bank took issue with the amounts of such claims and refused to make the payments, the vice-presidents filed claims with the Massachusetts Department of Labor and Industries under the Massachusetts Nonpayment of Wages Statute, Mass. Gen. L., ch.149, § 148 (1982) (hereinafter

1. Respondent indicates references to the Joint Appendix as (J.A. —).

the "Massachusetts Statute").[2] (J.A. 18-19) The vacation pay claims fell under the Massachusetts Statute because it provides that the word "wages" includes "vacation payments due an employee *under an oral or written agreement.*" (emphasis added) (J.A. 19) As a result of the vice-presidents' claims that such an agreement existed, the Commonwealth of Massachusetts initiated criminal proceedings against Morash. (J.A. 18)[3]

Morash moved to dismiss the criminal complaints on the ground that the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (hereinafter "ERISA"), preempts application of the Massachusetts Statute to employers' agreements to pay employees for accrued, unused vacation time upon separation from employment. (J.A. 7-13) Because of the import of the issue presented by the motion, the trial court reported the question of law to the Massachusetts Court of Appeals.[4] (J.A. 14-15) To report the question of law, the parties stipulated that:

2. Although the Bank refused to make payments for unused vacation time earned prior to the year of termination, the Bank agreed that it had a policy of paying employees for vacation time earned but not used within the year of termination, and it tendered such payments. (J.A. 19)

3. Each vice-president also filed a civil action, which includes an ERISA count for the same vacation benefits at issue in the instant case.

4. The Massachusetts Supreme Judicial Court accepted the case *sua sponte* for its direct review.

the Bank made oral and/or written agreements, and that such agreements promised employees payment in lieu of unused vacation time.

(J.A. 19)[5]

The question reported was whether ERISA precludes prosecution of an employer for not "compensating a former employee for unused vacation time due such employee pursuant to an oral or written agreement." (J.A. 14-15) The Massachusetts Supreme Judicial Court answered the question affirmatively, holding that the agreement to make such vacation payments was an "employee welfare benefit plan" under ERISA. Therefore, prosecution under the Massachusetts Statute was preempted. (Pet. A6-7)[6]

———o———

SUMMARY OF ARGUMENT

In enacting ERISA, Congress purposefully provided for comprehensive and preemptive federal regulation of the field of employee benefit plans. To ensure broad coverage of employee benefit plans, Congress enumerated many benefits to which ERISA applies. Expressly included in that list is "vacation benefits."

Cognizant of Congress' language and intentions, the Massachusetts Supreme Judicial Court has held that

---

5. The parties did not stipulate, and therefore there is no record, regarding the Bank's means of recordkeeping or how it administered the program, except that the Bank made the payments from its general assets.

6. Respondent cites to the Massachusetts Supreme Judicial Court's *Morash* decision by referring to the copy of the opinion provided in Appendix A of Petitioner's Petition for Writ of Certiorari, indicated as (Pet. A —).

ERISA preempts application of the Massachusetts Statute to the particular vacation benefit plan at issue in *Morash*, which allowed employees to accumulate unused vacation time and receive a lump-sum payment for such time upon termination. The Supreme Judicial Court's holding is based on three rulings of law: (1) that the Bank's vacation benefit plan was an "employee welfare benefit plan" as defined by ERISA; (2) that the Massachusetts Statute relates to an "employee welfare benefit plan" by referring to agreements to provide vacation pay and by applying to the Bank's vacation plan; and (3) that the limited exception to ERISA's preemption for "generally applicable criminal laws" does not apply to the Massachusetts Statute to save it from preemption.

The main thrust of Petitioner's disagreement with the Massachusetts court's decision is a regulation issued by the Department of Labor in 1975 (hereinafter the "Regulation"). The Regulation purports to distinguish certain wage-related vacation payments made regularly during the course of employment from vacation benefit plans to which ERISA applies. Petitioner and its amici argue that under the Regulation the Bank's vacation benefit plan is a wage or payroll practice outside of ERISA's coverage.

Respondent disagrees. Respondent contends that the Regulation does not apply to the Bank's vacation benefit plan, because the Regulation applies solely to the regular wages which employees receive while employed but on vacation. The Bank's program was not such a program. Instead, it was an agreement to provide a lump-sum payment upon termination of employment for accrued, unused vacation time. Additionally, the Bank's plan allowed

an employee to accumulate compensation on a tax-deferred basis.

If, however, the Regulation applies to the Bank's vacation benefit plan, Respondent submits that the Regulation clearly contravenes ERISA's express coverage of vacation benefit plans. There is no indication, either express or implied, that Congress intended the term "vacation benefits" in ERISA to apply only to funded vacation plans, as Petitioner and the amici argue. A Regulation which interprets ERISA to exclude certain specifically enumerated benefits construes the statute in an impermissible manner.

Since the Bank's vacation program is an "employee welfare benefit plan," there are two additional issues for the Court's consideration. First, Petitioner contends that even if an agreement to provide vacation benefits is an "employee welfare benefit plan," the Massachusetts Statute does not "relate to" such a plan. Since, however, the language of the Massachusetts Statute refers to "vacation payments due an employee under an oral or written agreement," and the Commonwealth of Massachusetts utilizes that statute to compel employers to comply with ERISA-covered vacation benefit plans, the law clearly relates to "employee welfare benefit plans." Second, Petitioner tries to save the Massachusetts law from preemption through ERISA's exemption for "generally applicable criminal laws." Respondent submits that the Massachusetts law, while criminal, is not "generally applicable" as are laws against larceny or embezzlement, but applies only to a limited group of employers which agree to provide certain vacation benefits.

ARGUMENT

I. THE BANK'S VACATION BENEFIT PLAN IS AN "EMPLOYEE WELFARE BENEFIT PLAN" UNDER ERISA.

A. The Department Of Labor Regulation Defining "Payroll Practices" Does Not Exclude The Bank's Vacation Benefit Plan From ERISA's Coverage.

Section 3 of ERISA provides that "the terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund or program . . . established or maintained by an employer . . . for the purpose of providing for its participants . . . *vacation benefits* . . . ." § 3; 29 U.S.C. § 1002 (emphasis added). Under such unambiguous language, vacation benefit plans, funds or programs are "employee welfare benefit plans" within ERISA's coverage. Thus, if ERISA is taken literally, the Bank's vacation benefit plan is an "employee welfare benefit plan."

Petitioner and its amici apparently agree that the language quoted above brings certain vacation benefit arrangements squarely within ERISA's coverage, but argue that the Bank's vacation benefit plan or program should be excluded from such coverage. The basis for their argument is a Department of Labor Regulation which provides:

> [T]he terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> . . . .
>
> (3) Payment of compensation, out of the employer's general assets, *on account of periods of time during which the employee . . . performs no duties;* for example—(i) Payment of compensation *while an employee is on vacation* or absent on a holiday . . . .

29 C.F.R. § 2510.3-1 (emphasis added) (hereinafter the "Regulation").

Although the Regulation lacks clarity, it was apparently promulgated to distinguish benefits from simple wages, and to exclude such wages from ERISA's coverage. Indeed, Petitioner and the amici contend that the benefits provided by the Bank's plan cannot be distinguished from simple wages and thus come within the Regulation.

The Massachusetts Supreme Judicial Court disagreed with Petitioner's arguments by holding that the Bank's plan did not fall within the Regulation.[7] According to such court, the portion of the Regulation applicable to vacation pay deals with an employer's payments to employees while they are on vacation and performing no duties, but not with payment for unused vacation time upon termination. The court further stated that the Bank's vacation benefit plan was more akin to a severance pay plan, which is an employee benefit plan that clearly falls within the coverage of ERISA, than to the types of wage practices addressed by the Regulation. (Pet. A13)

In disagreeing with the Massachusetts Supreme Judicial Court's decision, Petitioner and its amici contend that the Bank's program was not akin to a severance pay plan, but was simply a wage plan. To support such position, Petitioner focuses on a fact pattern different than

---

7. The Massachusetts Supreme Judicial Court stated that it need not decide whether the Regulation was valid, because such Regulation did not apply to the Bank's plan. (Pet. A13)

the one presented by *Morash*. (Pet. br. 37-38)[8] Petitioner notes that when an employee takes two weeks as vacation time and receives payment for that time, the employee simply receives wages for a period of time not worked. In such a case, the employee on vacation receives his/her normal paycheck from which the employer deducts normal taxes, social security payments, and any other deductions the employee authorizes, such as payment for health insurance. Both during and after vacation, the employee receives the same wage check received prior to vacation.

Although such a practice might be precisely the situation the Department of Labor attempted to remove from ERISA coverage, it is not the factual situation presented by this case. Under the Bank's vacation benefit plan, employees were allowed, at their option, to save and accumulate vacation time, and to defer payment for such time until termination.[9] Upon termination of employment, the employee would receive a check for accumulated time, with such time valued at the employee's current wage or salary, rather than at the wage or salary the employee was earning in the year when the vacation time was earned.

The tax ramifications of the Bank's plan were also significantly different than those of "normal" vacation payments. If an employee did not take vacation time dur-

---

8. Respondent indicates references to the various opposing briefs as follows: Petitioner's brief as (Pet. br. —), the Solicitor General's brief as (SG —), the AFL-CIO's brief as (AFL —), and the State Attorneys General's brief as (States —).

9. The AFL-CIO and Solicitor General have suggested that the Bank's plan provided a premium to employees who were required to forfeit vacation time in any given year. (AFL 10-11; SG 20-21) The record does not support such suggestion.

ing the year in which it was earned, the employee was not required to pay taxes on such vacation earnings for that year. Tax payments were not required until termination, when the employee received a lump-sum monetary distribution. Thus, not only was the Bank's vacation benefit plan akin to a severance plan, but it had some of the tax attributes of a deferred compensation or savings program. Under those programs, employees may, at their option, set aside certain earned income by placing it in a tax deferred account, and the deferred amount earns interest or otherwise increases as time passes. Taxes do not become due until the money is withdrawn. Under the Bank's benefit plan, the employees had the option of setting aside a certain portion of their "earnings" in the form of accrued but unused vacation time. The tax on such earnings was deferred until the earnings were withdrawn. In the interim, the time between earning and withdrawal, the saved amount would increase in value as the employee's wage or salary increased.

Unable to counter the factual distinctions between the Bank's vacation benefit plan and normal payments for vacation time taken during employment, Petitioner and its amici have focused on one factor in support of their argument, namely that the Bank made its lump-sum payment upon termination from its "general assets."[10] The term "general assets" is contained in the Regulation, which refers to "payment of compensation, *out of the employer's*

---

10. The Solicitor General's entire argument in support of Petitioner's position is grounded in the general assets test. According to the Solicitor General, for a vacation benefit plan to come within ERISA coverage, it must be "funded." (SG 13-14, 17)

general assets, on account of periods of time during which the employee . . . performs no duties." 29 C.F.R. § 2510.3-1 (emphasis added). Petitioner and its amici contend that any vacation plan with payment made out of general assets is not an "employee welfare benefit plan" under ERISA. In fact, Petitioner and its amici take their argument one step further, and suggest that in order for a vacation benefit plan to fall within ERISA's coverage, the plan must be funded. (Pet. br. 38, SG 14, AFL 18)

The "general assets" test is incorrect for a number of reasons. First, the argument that ERISA does not cover vacation benefits paid out of general assets patently ignores the language of the statute. Congress clearly stated that under ERISA an "employee welfare benefit plan" includes "any *plan*, fund or *program* . . . [to] . . . provid[e] . . . vacation benefits." § 3; 29 U.S.C. § 1002 (emphasis added). If payment out of general assets were the key factor in determining whether such a plan is an employee welfare benefit plan, "plans" and "programs," which are generally not funded, would be eliminated from ERISA coverage, and only "funds" would remain. If Congress had meant ERISA to apply only to funded employee welfare benefit plans, the words "plan" and "program" would not appear in the statute. Congress, however, chose to include both the terms "plan" and "program." In determining congressional intent a court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985), quoting from *Park 'N Fly, Inc. v. Dallas Park and Fly, Inc.*, 469 U.S. 189, 194 (1985).

Second, Petitioner's argument fails to consider other definitional language of ERISA, specifically § 3(1)(B). Under § 3(1)(B), ERISA defines "employee welfare benefit plans" to include those funds identified in or described by § 302(c) of the Labor Management Relations Act. Section 302(c) specifically refers to jointly administered, management/union, "pooled vacation funds." Both the Solicitor General and the AFL-CIO state in their amici briefs that pooled vacation plans, such as those negotiated by the longshoremen and construction unions, are the only types of vacation benefit programs meant to fall within ERISA's coverage. (SG 14, AFL 18) If the Solicitor General and AFL-CIO were correct, Congress would have had no reason to include the term "vacation benefits" in § 3(1)(A) of ERISA, since the funds to which the amici refer are both included within § 3(1)(B). Such a result is both unreasonable and incorrect because, again, if Congress had meant ERISA to apply only to those vacation benefits paid from pooled vacation funds, it easily could have said so. This Court cannot ignore statutory language, as the Solicitor General and AFL-CIO would advocate.

Third, a test based on "general assets" ignores the reality that most employer-provided welfare benefit plans are paid out of general assets. By far the minority of employee welfare benefit plans sponsored and provided by employers in this country today utilize funds.[11] If the

---

11. Employee welfare benefit plans must be distinguished from pension plans. One hundred percent (100%) of pension plans are funded. Employee welfare benefit plans, which provide for programs such as insurance coverage, severance pay, deferred compensation programs and vacation benefit programs, are generally not funded.

general assets factor were considered determinative, then few, if any, employee welfare benefit plans would come within ERISA's coverage, a conclusion already in contravention of this Court's decisions. This Court has recognized, for example, that severance pay plans, although paid out of general assets, qualify as "employee welfare benefit plans" rather than as wage payments. *Fort Halifax Packing Co. v. Coyne,* 107 S.Ct. 2211, 2215, n. 5 (1987), citing *Holland v. Burlington Indus., Inc.,* 772 F.2d 1140 (4th Cir. 1985) and *Gilbert v. Burlington Indus., Inc.,* 765 F.2d 320 (2d Cir. 1985), both *aff'd,* 477 U.S. 901 (1986). Since severance plans with payments made out of general assets are "employee welfare benefit plans," a plan similar to a severance plan, such as the Bank's vacation benefit plan, must also fall within ERISA's coverage.

Finally, the general assets factor is one of many factors set out by the Regulation in question, not the only factor. The Regulation, which must be read as a whole, refers to payments "out of the employer's general assets, on account of periods of time during which the employee . . . performs no duties; for example—(i) Payment of compensation while an employee is on vacation . . . ." Thus, the term "general assets" must be read in conjunction with the phrase "performs no duties." In the instant situation, while the Bank made its lump-sum vacation pay distribution out of general assets, it was not paid to an *employee* who was *performing no duties while on vacation.* Rather, the Bank provided the lump-sum distribution to an individual who had terminated employment and had no duties to perform.

For the above-stated reasons, the Massachusetts Supreme Judicial Court was correct in holding that the

Bank's vacation benefit program was within ERISA's coverage, as opposed to a wage program under the Department of Labor's Regulation. To hold that the Bank's plan was within the Regulation would have the effect of placing virtually every vacation benefit plan paid out of general assets outside of ERISA's coverage, thus ignoring the clear language of that statute.

B. If The Regulation Excludes The Bank's Plan From ERISA's Coverage, The Regulation Is Void.

1. The Regulation conflicts with ERISA's express coverage.

The Supreme Judicial Court found it unnecessary to rule on the validity of the Regulation at issue in this case. (Pet. A13) If, however, this Court finds that the Bank's plan is covered by the Regulation, Respondent submits that the Regulation is invalid.

To assess the validity of a regulation, this Court must determine whether the promulgating agency's construction of a statute is contrary to congressional intent, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If congressional intent is clear, and the regulation departs from such intent, then "that is the end of the matter." *Id.* In this case, the Solicitor General and the AFL-CIO argue that the Department of Labor has construed ERISA's express inclusion of vacation benefit plans, funds or programs to mean only vacation plans that provide for payment from funds. According to the Solicitor General, "payment of vacation benefits from a trust fund . . . is subject to ERISA. But otherwise the payment of vacation benefits is governed by state law."

(SG 14) Similarly, the AFL-CIO contends that the Secretary of Labor has delineated the types of vacation benefit plans that are covered by ERISA, but then offers only one example of such plan, a multi-employer trust fund. (AFL 16-17) It is clear, however, that Congress did not intend to limit ERISA's vacation benefit coverage only to funded plans.

First, Congress expressly identified two methods of establishing and maintaining a vacation "employee welfare benefit plan" under ERISA that do not require a fund—plans or programs. § 3(1); 29 U.S.C. § 1002(1). If the Regulation limits the vacation benefits that ERISA covers to only those vacation payments maintained or provided by funds, then the Regulation eliminates from ERISA's coverage two of the three expressly identified methods of providing benefits.

Second, Congress provided separately for the types of vacation benefits that the Solicitor General and AFL-CIO offer as lone examples of the types of vacation benefit plans within ERISA's coverage. In subsection (1)(A) of Section 3, Congress listed the types of benefits that a plan, fund or program might provide, and included vacation benefits in that list. § 3; 29 U.S.C. § 1002(1)(A). In subsection (1)(B) of Section 3, Congress stated that the term "employee welfare benefit plan" also includes "any benefit described in section 186(c) of this title." § 3; 29 U.S.C. § 1002(1)(B). By incorporating section 186(c), § 302 of the Labor Management Relations Act, into ERISA, Congress specifically ensured that "pooled vacation funds" would be covered by ERISA. Had Congress intended "vacation benefits" in § 3(1)(A) to mean only pooled or funded vacation benefits, there would have been no need to create § 3(1)(B). Since statutory language cannot be considered

superfluous, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), "vacation benefits" in § 3(1)(A) has meaning only if it refers to something other than pooled vacation funds, for example, the Bank's vacation benefit plan.

2. If, arguendo, ERISA is ambiguous regarding vacation benefits, the Regulation's interpretation of ERISA is unreasonable.

Even if, arguendo, it were not clear whether Congress intended the Bank's vacation benefit plan to fall within ERISA's coverage, the Regulation's interpretation is unreasonable and, therefore, invalid. When a statute is silent or ambiguous and a court determines that "Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute," *Chevron, U.S.A., Inc.*, 467 U.S. at 843. In this case, the Department of Labor has derived its answer from an unreasonable and impermissible interpretation of ERISA.

The Department of Labor's interpretation is impermissible for several reasons. Again, insofar as the Regulation eliminates "plans" and/or "programs" from ERISA coverage, the Regulation belies the plain language of that statute. Furthermore, it is unreasonable to add a funding requirement to vacation benefit plans when Congress did not do so.

The Department of Labor's interpretation of ERISA is also unacceptable because it disregards ERISA's fundamental purposes. One such purpose was to provide an exclusive federal system to regulate the field of employee benefit plans. Both ERISA's language and its history

categorically establish that Congress intended ERISA's scope to ensure protection of virtually *all* employee benefit plans. § 2; 29 U.S.C. § 1001. ERISA plainly states:

> The provisions of this title . . . shall supercede any and all State laws insofar as they may now or hereafter relate to *any* employee benefit plan . . . .

§ 514(a); 29 U.S.C. § 1144(a) (emphasis added).

ERISA's legislative history underscores just how purposefully Congress extended ERISA's parameters. Congress did not include a preemption provision in ERISA cavalierly. In fact, both the House and Senate versions of ERISA provided for broad preemption. H.R. 2, 93d Cong., 2d Sess., § 514 (1974); H.R. 2, 93d Cong., 1st Sess., § 699 (1973). Each of those versions provided that ERISA would preempt any state laws that might regulate the same areas explicitly regulated by ERISA, and one such area is *vacation benefits*. Significantly, the Conference Committee rejected those versions in order to *broaden* preemption to extend to *all* state laws unless expressly saved. *See* H.R. Conf. Rep. No. 93-1280, p. 383 (1974). According to Senator Javits, the rejected provisions

> raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws.
>
> The emergence of a *comprehensive* and *pervasive* Federal interest and the interests of *uniformity* with respect to interstate plans required—but for certain exceptions—the displacement of State action *in the field of private employee benefit programs.*

120 Cong. Rec. 29942 (1974) (emphasis added). Based on ERISA's language and history, this Court has recognized that to effectuate Congress' intentions, the courts must view ERISA's coverage and preemption expansively. *Pilot*

Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549, 1552 (1987). Against that background, the Department of Labor's construction of ERISA that narrows that statute's applicability is not permissible.

The Department of Labor's interpretation also ignores that ERISA covers "employee welfare benefit plans" as well as pension plans. Petitioner and its amici justify limiting coverage of the vacation benefits section to fund-based vacation benefits by focusing on Congress' concern for *pension* plan mismanagement, and by suggesting that ERISA does not cover unfunded welfare plans because mismanagement concerns are not relevant to them. (SG 17) Petitioner contends that Congress was "primarily concerned" with pension plans and abuses. (Pet. br. 41) Yet Congress enacted a statute that covers "employee welfare benefit plans" as well as pension plans, and in its coverage of "employee welfare benefit plans," Congress did not limit ERISA's application to plans that were funded.

Finally, the Department of Labor's interpretation is impermissible because it impedes the use of ERISA to protect welfare benefit plans from abuses Congress intended to address.[12] When Petitioner states that it was only vacation funds "that Congress intended to control because these plans were potential targets for abuse and mismanagement," (Pet. br. 42) it mistakenly ignores two

12. Petitioner and its amici states express concern that if the states can no longer regulate these vacation payment plans, employees are left unprotected. (Pet. br. 45, States 9) That contention is absurd. The issue here is not whether employees' vacation benefits will be protected, but simply which law, federal or state, will regulate such benefit plans and protect the employees' benefits.

factors: (1) that promises of future payments of vacation benefits without establishment of a fund are also subject to abuse and mismanagement, particularly if no accounting is made to ensure that an employer maintains sufficient monies to pay the benefits when claimed, and (2) that Congress also intended to correct a second abuse, failure or refusal to pay employees the benefits promised, *California Hosp. Ass'n v. Henning,* 770 F.2d 856, 859 (9th Cir. 1985).

Vacation benefit plans, like the Bank's plan, may raise both issues. If an employer promises its employees that they can bank vacation time and receive payment for it upon termination, but at such time, the employer lacks sufficient funds to make those payments, the employer may have abused its fiduciary duty by mismanaging the monies it owes to employees.[13] If, like the Bank, an employer refuses to make vacation payments to an employee separating from employment, such failure to pay is an abuse Congress intended ERISA to correct.

C. Under This Court's Fort Halifax Decision The Bank's Vacation Benefits Plan Is An Employee Welfare Benefit Plan.

In *Fort Halifax Packing Co., Inc. v. Coyne,* 107 S.Ct. 2211 (1987), this Court ruled that one-time, state-man-

13. Under the Bank's vacation benefit plan, the employee had a right to contribute to his/her termination benefit. The employee made such contribution by choosing whether to take vacation in the year earned, or to save such vacation time for payment upon termination. If the employee chose to save such time, the employer had a fiduciary duty for the employee's money. This fiduciary duty is clearer than the duty owed under a typical severance plan, where the employee has no opportunity to make such contribution and thus does not entrust any funds to the employer.

dated severance payments upon plant closing were not an "employee welfare benefit plan." Petitioner has tried to analogize the Maine severance statute in *Fort Halifax* to the Massachusetts Statute in this case to argue that the Bank's vacation benefit plan was not an "employee welfare benefit plan." In making such analogy, however, Petitioner has focused solely on the payment of a lump-sum to employees upon termination of employment.[14]

Respondent and the Solicitor General agree with the court below that there is no merit to Petitioner's contention regarding *Fort Halifax*. *Morash* and *Fort Halifax* are distinguishable in two fundamental ways. First, the Maine statute imposed a severance pay obligation in the case of plant closings, but the "employer has no such liability . . . if the employee is covered by a contract that deals with the issue of severance pay," *Id.* at 2214. Since the Maine statute provides that employers must make payments *only* if they have not otherwise agreed to do so, the statute does not apply to employer-sponsored plans. In contrast, the Massachusetts Statute deals with vacation payments "due an employee under an oral or written agreement." Whereas the Maine statute applies only when employers have not agreed to provide benefits, the Massachusetts statute applies only when employers do agree to provide benefits.

Second, this Court considered whether the benefit payments in *Fort Halifax* implicated the administration or enforcement of employee welfare benefit plans, and

14. It is ironic that in this context Petitioner recognizes the analogy between severance pay and the Bank's vacation benefit.

ruled that if a state statute required employers to initiate or maintain a plan, then plan-related concerns might arise. *Id.* at 2216-17. Since the Maine statute, however, required only a one-time payment upon plant closing, it did not implicate either future plans for which administration or enforcement issues might arise or the regulatory concerns of ERISA itself. *Id.*

The Bank's benefit, however, implicated both a plan and ERISA's concerns. As the Massachusetts Supreme Judicial Court noted, the *Fort Halifax* ruling turned on a finding that state law mandated a one-time payment triggered by a *single event, a plant closing,* as opposed to the Bank's program which required adequate funds to meet periodic demands of separating employees. (Pet. A16) When the Bank agreed to reimburse each employee for unused vacation time upon termination from employment, the Bank assumed responsibility to pay benefits and faced periodic demands as each employee left its employ.

Finally, Petitioner assumes that the Bank's program would not raise any issues regarding disclosure and safeguards in the establishment, operation and administration of the program. (Pet. br. 28) Yet the Bank's program did raise such issues. Petitioner simplifies the program by assuming that the Bank "presumably simply computes the number of unused vacation days" and by concluding that "[t]o do little more than write a check hardly constitutes the operation of a benefit plan." (Pet. br. 28) In fact, the record does not address the administration of the Bank's program, other than that it made its payments from general assets. It can be expected, however, that the Bank had to keep track of time earned by each employee, maintain records of time used and/or saved, and make payments

to individual employees upon termination. Thus, the problems of record-keeping, disclosure to employees of the basis for calculations, and abuse, either by failing to ensure sufficient funds to meet employee demands or simply by refusing to make payments, raise the very concerns Congress intended ERISA to cover. *Fort Halifax,* 107 S.Ct. at 2217. Clearly the Bank's plan is an "employee welfare benefit plan," which Congress sought to regulate in ERISA, while the payment in *Fort Halifax* is simply a one-time benefit mandated by the State of Maine in the absence of an "employee welfare benefit plan."

II. THE MASSACHUSETTS LAW "RELATES TO" EMPLOYEE BENEFIT PLANS.

ERISA supersedes state laws only "insofar as they may now or hereafter relate to any employee benefit plan." § 514; 29 U.S.C. § 1144. Petitioner argues that pursuant to such language, even if the Bank's vacation policy were an "employee welfare benefit plan," ERISA does not preempt the Massachusetts Statute because such statute does not "relate to" the plan. Petitioner maintains that the Massachusetts Statute does not relate to a plan because it does not address any of the concerns that ERISA regulates, including disclosure, funding, reporting, vesting and/or enforcement.[15]

---

15. Petitioner receives no support from its amici on this argument. The Solicitor General dismisses the argument as entirely unpersuasive. "The acknowledged purpose of [Massachusetts' prosecution of the Bank for failure to pay vacation benefits] is to enforce the bank's vacation leave policy, so the statute plainly 'relate[s] to' the plan." (SG 10) The state Attorneys General and the AFL-CIO do not address the argument.

This Court has explained and recently reiterated that a state law "'relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Mackey v. Lanier Collection Agency and Serv., Inc.,* 108 S.Ct. 2182, 2185 (1988); *Fort Halifax,* 107 S.Ct. at 2215, citing *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 96-97 (1983). The Massachusetts Statute clearly has a connection or reference to a plan. The language of the statute expressly applies to "oral or written agreements to provide vacation pay," which are, in the context of this case, "employee welfare benefit plans." In determining whether to bring a criminal action, the Commonwealth's Department of Labor and Industries must review employer vacation arrangements to determine whether an oral or written agreement exists. If the Department of Labor and Industries determines that an agreement exists, it must then bring a criminal action to enforce such agreement, which is an "employee welfare benefit plan." Thus, Petitioner's argument that the Massachusetts Statute does not relate to or purport to regulate an employee benefit plan is clearly erroneous with respect to enforcement. One of ERISA's basic concerns is that employers pay to their current or former employees the benefits owed them under the terms of a plan. § 502; 29 U.S.C. § 1132 (authorizing civil enforcement actions). The Massachusetts Statute regulates that very same concern because it charges its Department of Labor and Industries with ensuring that employers pay their employees the vacation benefits that have been promised.[16]

---

16. The Commonwealth contended below that enforcement is not involved because "[t]he employees here have not filed

(Continued on following page)

In addition, even if the Department of Labor and Industries took no action other than filing a claim, the Massachusetts Statute causes state interpretation of plans because state courts must determine both whether an employer has made any oral or written agreement respecting vacation pay and the meaning of that agreement. Again, the Massachusetts Statute clearly relates to an "employee welfare benefits plan."[17]

III. MASSACHUSETTS CANNOT EVADE PREEMPTION OF ITS WAGES STATUTE UNDER ERISA'S EXCEPTION FOR "GENERALLY APPLICABLE CRIMINAL LAWS."

A. Introduction.

Petitioner contends that even if the Bank's vacation benefit plan were an "employee welfare benefit plan" under ERISA, the Massachusetts law is not preempted because it is a "generally applicable criminal law." While ERISA's broad preemption provision does contain an exception for

---

(Continued from previous page)

a claim to . . . compel an employer to pay out benefits from a plan." (Commonwealth's Appellee brief below at 27) Certainly, however, employees who file charges with the Commonwealth expect their employers to be compelled to make payments. In most cases, the courts order that payments be made.

17. Evidently sensing the weakness of its "relates to" argument, Petitioner has argued an additional standard, that a state law must "purport to regulate" ERISA plans. (Pet. br. 52-61) Even if such standard were applicable, Petitioner's argument fails. By the Massachusetts Statute's application to vacation plans and the Commonwealth's enforcement of the Statute to ensure that employers comply with the plans or policies that they allegedly provide to their employees, Massachusetts purports to regulate ERISA-covered plans.

"any generally applicable criminal law of a State," § 514 (b)(4); 29 U.S.C. § 1144(b)(4) (hereinafter the "Exception"), such Exception does not apply here because (1) the Massachusetts law is not a "generally applicable criminal law" as the term is commonly and sensibly understood, and (2) exempting the Massachusetts Statute, and other similar state statutes, would cause exactly the inconsistent and patchwork type of regulation that Congress expressly intended ERISA to eliminate.[18] *Fort Halifax,* 107 S.Ct. at 2217.

B. The Massachusetts Wages Statute Is Not A "Generally Applicable Criminal Law."

Petitioner's argument that the Massachusetts Statute falls under the Exception relies solely on the phrase "generally applicable law." Petitioner contends that such term includes those laws that "extend to the entire state and embrace all persons or things of a particular class." (Pet. br. 66-67) Under Petitioner's theory, the Massachusetts Statute is generally applicable because it applies to all employers who pay wages and/or all employers who provide vacation benefit programs to employees. (Pet. br. 67) That definition is forced, unconvincing and, as the Solicitor General has noted, "plainly flawed." (SG 25) Petitioner's proposal that a statute is generally applicable if it embraces all persons or things of a particular class ignores the opposite, but more logical, conclusion—that a statute which applies only to a certain class of persons, such as all employers who pay vacation pay, is of limited rather than general applicability.

---

18. The amici State Attorneys General have joined Petitioner in this argument. The Solicitor General has flatly rejected Petitioner's position. (SG 10-11)

A more logical and common sense definition of the term "generally applicable" was rendered by the Massachusetts Supreme Judicial Court in *Commonwealth v. Federico*, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377-78 (1981), in which the Supreme Judicial Court held

> The § 1144(b)(4) exception from preemption for "generally applicable" State criminal laws appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example. By virtue of § 1144(b)(4), a State is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan, simply because the theft involved such a plan. But by limiting the . . . exception to criminal laws of *general* applicability, Congress apparently intended to preempt State criminal statutes aimed specifically at employee benefit plans.[19]

The Massachusetts Supreme Judicial Court's interpretation is so sensible that, contrary to Petitioner's complaint that there is no uniform standard of the Exception's meaning (Pet. br. 63), the Massachusetts standard has been accepted and applied in other jurisdictions, e.g., *Baker v. Caravan Moving Corp.*, 561 F.Supp. 337, 341 (N.D. Ill.

---

19. The Massachusetts Supreme Judicial Court adopted its reasoning in *Federico* in *Morash*. The Massachusetts court stated that "because our statute is limited to the nonpayment of 'wages' by an employer to an employee, including agreed upon vacation payments which will often be funded from 'employee benefit plans,' prosecution under the statute is not saved from preemption by the exception for generally applicable criminal laws." (Pet. A-31-32)

1983); *People v. Art Steel Co.*, 133 Misc.2d 1001, 1009, 509 N.Y.S.2d 715, 720 (1986). As the Solicitor General has noted:

> The majority of courts that have considered the matter have agreed, as the court below noted (Pet. App. A29-30), that the exception "'seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example'" (citation omitted) The Massachusetts statute at issue does not apply to "conduct generally," but instead governs only the wage and benefit payment practices of employers . . . .

(SG 23-24)

Petitioner also claims that its interpretation of "generally applicable" is consistent with a state's right to be free of interference in areas of traditional criminal regulation. Thus, the Commonwealth and its amici states contend that Congress did not intend to preempt states' traditional exercise of police powers, and that wage regulation is such an exercise.

Yet, this case does not invoke the states' traditional right to regulate wages. Instead, this case involves a relatively modern extension of such regulation, the right to regulate vacation benefit plans or programs. Although Massachusetts has regulated wages since 1879, it amended its wages statute to extend to vacation benefits nearly a century later, in 1966. (Pet. br. 19-20)

The amici Attorneys General assert that:

> over half of the statutes in these states explicitly include, or have been interpreted to include vacation wages. (footnote omitted) In many states, *these statutes* have existed in some form for nearly one hundred years. (footnote omitted)

(States 10) (emphasis added). That statement is *materially deceptive.* Whereas the statutes regulating wages may have existed for nearly one hundred years, those that expressly extend to vacation pay were so amended only within the last ten to twenty years.[20] Further, since the states have chosen their wages statutes as their means of regulating vacation pay, it is reasonable to infer that the vacation provisions in such statutes apply only to those vacation payments that are wages, namely those wages that an employee continues to receive while on vacation, not to the payment that an individual receives as a lump-sum distribution upon terminating employment. In summary, the Massachusetts Statute is neither "generally applicable," nor a part of a state's traditional exercise of police powers. The Massachusetts Statute is not saved by the Exception.

---

20. For example, North Carolina and Oklahoma amended their statutes to cover vacation pay beginning in 1980 and 1982, respectively. N.C. Gen. Stat. § 95-25.2(16) (Supp. 1988); Okla. Stat. Ann. tit. 40, § 165.1(3) (West 1986). Another seven states, including Illinois, Minnesota and Ohio, enacted legislation in the 1970's to add vacation provisions. Ill. Ann. Stat. ch. 48, para. 39m-2 (Smith-Hurd 1986); Ohio Rev. Code Ann. § 4113.15(D)(2) (Anderson 1980); Minn. Stat. Ann. § 181.74 (West Supp. 1988). Further, a third group of amici states, including Connecticut, New Jersey and Oregon, may apply their wages statutes to vacation pay, but do not have statutory language that expressly refers to vacation payments. Conn. Gen. Stat. Ann. § 31-7 (a) (West 1958 & Supp. 1988); N.J. Stat. Ann. § 34:11-57 (West 1988); Or. Rev. Stat. §§ 652.210(3) & 652.320(9) (1987). The states have not regulated vacation payments as part of their traditional exercise of police powers.

C. Saving This State Law From ERISA's Preemption Clearly Conflicts With The Prrposes Of That Express Preemption.

The states should not succeed in evading preemption of their laws regulating vacation benefits, because excepting such laws would contravene Congress' clear intent to establish a comprehensive regulatory scheme. *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549, 1551 (1987). As Representative Dent noted, the "crowning achievement" of ERISA was "the reservation to Federal authority [of] the sole authority to regulate the field of employee benefit plans." 120 Cong. Rec. 29197 (1974). Similarly, Senator Williams noted that:

> with the *narrow exceptions* specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, *thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.*

120 Cong. Rec. 29933 (emphasis added). Congress' intention that ERISA establish an exclusive system of pension and welfare benefit regulation is undeniable. *Pilot Life,* 107 S.Ct. at 1555. Exempting state regulation of vacation benefit plans from preemption would clash with that intention by creating both a conflict between state regulation and ERISA, and inconsistent regulation from state to state.

The conflict between state requirements and ERISA's provisions permeates their regulatory schemes. This Court has agreed that Congress intended ERISA's civil enforcement provisions to be the "exclusive vehicle of actions by plan participants." *Pilot Life,* 107 S.Ct. at 1555. Yet

whereas ERISA provides for civil penalties in cases of failure or refusal to pay, nearly every amicus state prescribes criminal penalties. (Pet. Appendix B) Moreover, it must be presumed that Congress intended that payment of benefits not be compelled by criminal penalties. This Court has noted that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress enacted a comprehensive scheme including an integrated system of procedures for enforcement." *Pilot Life*, 107 S.Ct. at 1556. In this context, Congress expressly rejected criminal enforcement of plan rights. To allow the states to use criminal statutes to enforce welfare benefit plans would upset the carefully constructed and balanced system of procedures and sanctions created by Congress in ERISA. To permit states to regulate vacation benefits by addressing the same ills as ERISA, but by prescribing different procedures and remedies, is to subject both administrators and participants to a confused and ineffective complex of regulations.

Similarly, differences among state requirements will continue to bemuse administrators. As the Solicitor General has noted, application of state laws to employee benefit plans "would effectively defeat ERISA's goal" of establishing "a uniform administrative scheme to guide claims processing and the disbursement of benefits." (SG 29) An employer with facilities located in more than one state will find itself subject to ERISA and to as many state laws as it has locations. Depending on the state, failure to make vacation payments may be the basis for criminal actions or civil actions, sometimes prosecuted by the state and sometimes prosecuted by employees. Requirements also vary regarding the time of payment. For example,

final payments of vacation pay upon termination of employment can be due immediately upon discharge in California, Cal. Lab. Code § 201 (Deering 1987); on the next business day in Connecticut, Conn. Gen. Stat. Ann. § 31-71c (West Supp. 1988); within 72 hours in New Hampshire, N.H. Rev. Stat. Ann. § 275:44I (1987); within three working days in Alaska, Alaska Stat. § 23.05.140 (1984); and no later than the next regular pay day in Illinois and New Jersey, Ill. Ann. ch. 48, para. 39m-5 (Smith-Hurd 1986); N.J. Stat. Ann. § 34:11-4.3 (West 1988). Penalties differ in terms of fines that range from $50 in Texas, Tex. Lab. Code Ann. § 5157 (Vernon 1987); to $500 in Vermont and Wisconsin, Vt. Stat. Ann. tit. 21, § 345a (1987); Wis. Stat. Ann. § 109.03(2) (West 1988); and to $3,000 in Massachusetts, Mass. Gen. L., ch. 149, § 148 (1982); and depending on whether a state authorizes incarceration, damages, attorneys' fees and interest.

This Court has advised that whether ERISA preempts state law is a question of Congressional intent, and that the purpose of Congress is the "ultimate touchstone." *Pilot Life*, 107 S.Ct. at 1552. It is clear that Congress intended ERISA's preemption to be expansive. It is also clear that the purpose of that expansiveness was to ensure regulation of employee welfare benefit plans by a uniform system. Permitting the states to evade preemption, by means of the "generally applicable criminal laws" exception, or otherwise, would both disregard and disobey Congress' clear intent.

CONCLUSION

The judgment of the Massachusetts Supreme Judicial Court should be affirmed.

Respectfully submitted,

JASON BERGER
MARCIA E. GREENBERG
TESTA, HURWITZ & THIBEAULT
53 State Street
Boston, MA 02109
(617) 367-7500

Dated: January 3, 1989

No. 88-32.

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

RICHARD N. MORASH,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief for Petitioner.

JAMES M. SHANNON,
Attorney General,
RUTH A. BOURQUIN,
MARC C. LAREDO,*
CARL VALVO,
Assistant Attorneys General,
One Ashburton Place, Room 1811,
Boston, Massachusetts 02108.
(617) 727-2200 ext. 2828
Counsel for Petitioner

**Counsel of Record*

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

The petitioner, the Commonwealth of Massachusetts, submits this brief in reply to the briefs filed by respondent and amici curiae.[1/] In this reply, the petitioner will demonstrate (1) that the Bank's agreement to pay employees for unused vacation time does not constitute an "employee benefit plan" covered by ERISA and (2) that the respondent's and the Solicitor General's interpretation of the exemption for "generally applicable criminal laws" provided by ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4), is highly problematic,

---

1/ References to respondent's brief shall be cited as (Resp. Br.), to petitioner's initial brief as (Pet. Br.), to the brief of the AFL-CIO as amicus curiae as (AFL-CIO Br.), to the brief filed by the Solicitor General for the United States as amicus curiae as (S.G. Br.), to the brief of the various states participating as amici curiae as (St. Br.), and to the Appendix to the Petition for Certiorari as (Pet. App.).

and their fears concerning the breadth of the petitioner's approach are unfounded.

ARGUMENT

I. THE BANK'S AGREEMENT TO PAY WAGES FOR UNUSED VACATION TIME IS NOT AN ERISA EMPLOYEE BENEFIT PLAN.

A. Respondent Fails to Explain Why Money Owed For Work Performed During Time That Could Have Been Spent On Vacation But Instead Was Spent Working Is A "Vacation Benefit" and Not Wages.

The payments at issue in this case became due, pursuant to the Bank's agreement, because the Bank's employees worked during time they could have taken vacation. Thus, the legal issue presented is whether compensation paid for time an employee does not spend on vacation but instead works for the employer is a "vacation benefit" under ERISA

§ 3(1) or is compensation for time actually worked.[2/] The petitioner, the Secretary of Labor, and the Solicitor General contend that such compensation is closely akin, if not identical, to wages owed for work performed in the ordinary course. Respondent, on the other hand, says that such payments are "vacation benefits" because the duty

---

2/ Although "vacation benefits" are among the benefits specified in § 3(1), the term is not defined anywhere in the statute. Nor are its contours given any definition by ERISA's extensive legislative history. The official legislative history of ERISA is contained in a three-volume, 5300-page publication prepared by the Senate Subcommittee on Labor and Public Welfare and contains no substantive discussion of the term "vacation benefits." The 34-page index to the history in fact contains no reference to "vacation benefits." See Legislative History of the Employee Retirement Income Security Act of 1974, Senate Subcommittee on Labor and Public Welfare (Comm. Print 1976).

to pay them springs from an agreement dealing with vacation. (Resp. Br. 9).

In petitioner's view, the fact that the payments at issue have some nexus to an agreement involving vacation merely poses the question before this Court. The answer requires an understanding of what distinguishes wages paid for work performed from the concept of vacation. Properly analysed, the payments at issue here are virtually identical to wages for work performed and thus do not fall within the scope of benefits Congress sought to regulate.

The essence of a wage is "[p]ayment by an employer of compensation on account of work performed by an employee

. . . ." 29 C.F.R. § 2510.3-1(b)(1) (1987).[3/] By contrast, as the term implies, vacation is at the heart a "vacation benefit." The essence of vacation is the absence from work with the employer's permission.[4/]

That a payment due a salaried employee for working during what could have been vacation time is straight compensation can be graphically illustrated as follows. When an employee is hired at a set annual salary and promised, for

---

3/ See also Black's Law Dictionary 1416 (rev. 5th ed. 1979) (Wages. "A compensation given to a hired person for his or her services. Compensation of employees based on time worked or output of production.").

4/ See Black's Law Dictionary, supra, 1388 (Vacation. "A recess or leave of absence; a respite or time of respite from active duty or employment; an intermission or rest period during which activity or work is suspended.").

instance, four weeks of vacation, the employee is in effect being paid for only 48 weeks of actual work, even if the pay is distributed in 52 (or fewer) uniform installments over the entire year.[5/] When that employee does not use some or all of his or her allotted vacation time and instead spends more time working for the employer than is required by the basic employment agreement, the question of additional compensation arises. Unless the employer agrees to allow the employee to take the unused vacation time in a subsequent

---

5/ In other words, the salaried employee who takes vacation, i.e., is absent with leave from the workplace, is not actually paid for days spent on vacation; he or she is paid during or over periods including vacation the regular installments due for work performed during the work year.

year or at some point in the future to receive payment for foregone vacation time, the employee effectively goes unpaid for the additional time worked.[6/]

6/ Contrary to respondent's repeated suggestions in his brief (see, e.g., Resp. Br. 7, 21 & n.13, 22, 23, 24, 30), the record in this case does not support the conclusion that the payments at issue were due only upon termination; the record in fact supports the more general conclusion that employees could cash out their accrued vacation, presumably on demand, at any time after vacation was foregone. See J.A. at 19 ("[T]he Bank . . . promised employees payment in lieu of unused vacation time"). Termination is not a condition of receiving the payments at issue in this case. Thus, the parallels drawn by respondent (Resp. Br. 10) and the Supreme Judicial Court (Pet. App. A13) between the vacation payments under the Bank's agreement and severance pay are misplaced. See also Pet. Br. 35-36 & n.8.

Likewise, respondent's discussion about the income tax treatment of the payments at issue here does nothing to assist in resolution of the question

(footnote continued)

An agreement by an employer to make a cash payment to a salaried employee for foregone vacation time therefore is simply an agreement by the employer to compensate the employee for the additional time worked.[7] This is

---

(footnote continued)

before the Court (Resp. Br. 11-12). Of course the money paid to employees under the Bank's agreement is taxable as income only upon receipt by the employee. This would be true whether the payments constitute wages or severance pay. Nor is there anything about the fact that the income is deferred to a period subsequent to the period in which it is earned that transforms the money from payment for work performed into a benefit specified in ERISA § 3(1). See Resp. Br. 12.

7/ An agreement by the employer to allow the employee to carry over unused vacation time for later use has similar effect, in that the employee can work less than he or she otherwise would be required to work in a subsequent period while still receiving full salary in that period.

the very essence of a wage. See 29 C.F.R. § 2510.3-1(b)(1).[8]

If an agreement, like the Bank's, to make payments for unused vacation time were applied to hourly employees, the conclusion would be the same, with only

---

8/ When unused vacation time is cashed out or used in a later period in which the employee's salary has been increased, the employee is simply being paid at a premium rate for having worked rather than having gone on vacation in the earlier period. This does not change the fact that the payment is pure compensation for time worked. See discussion of 29 C.F.R. § 2510.3-1(b)(1) infra at 10-12.

Even if one conceives of an annual salary as intended not only to compensate the employee for days actually worked but actually to compensate the employee for time spent on vacation as well, the pay received when unused vacation days are cashed out is simply a premium paid by the employer. Analytically, such a payment is identical to premium pay for working at other times, such as weekends, nights or holidays, when the employee is otherwise entitled to be absent from the workplace. See discussion infra at 10-12.

a slight variation. The hourly employee who works during a week he or she otherwise could have been vacationing presumably is paid in the normal course for the hours he or she actually works. When, under the employer's agreement, the employee later takes payment for unused vacation time, the employee will in effect be paid again for that same week. The second payment for the one week of work the employee could have taken, but did not take, as vacation constitutes a premium for the employee having worked on his or her own time.[9/]

9/ If by the time the employee cashes out the unused vacation the wage rate has been increased, this means only that the premium paid is even higher, i.e. more than double time.

Such premium payments fit precisely within the Secretary's common sense definition of compensation that falls outside the ambit of ERISA, which is set forth at 29 C.F.R. § 2510.3-1(b)(1). That provision, the validity of which has not been challenged in this case, specifically excludes from ERISA coverage:

> Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as --
> (i) Overtime pay,
> (ii) Shift premiums
> (iii) Holiday premiums,
> (iv) Weekend premiums.

There is no rational basis for distinguishing premium pay for work performed by an employee on a weekend -- time the employee otherwise could have

been away from work -- from premium pay for work performed by an employee on days he or she otherwise could have spent away from work on vacation.[10/]

Accordingly, the pay at issue here -- pay for time worked rather than spent

---

10/ The question of whether money paid for time an employee actually spends on vacation constitutes wages or an aspect of a "vacation benefit" is not directly at issue in this case. That is the problem the Secretary addressed by the related regulation, 29 C.F.R. § 2510.3-1(b)(3)(i), which has been much discussed in the parties' and amici's briefs.

In considering respondent's challenge to the validity of this portion of the Secretary's regulation, it is worth noting that, for bankruptcy purposes, Congress has equated vacation pay with wages and salaries and distinguished it from benefits covered by employee benefit plans. Under 11 U.S.C. § 507(a), unsecured claims for "wages [and] salaries . . . including vacation . . . pay" are given third priority while unsecured claims for contributions to "employee benefit plans" are fourth priority.

on vacation -- is properly viewed as a wage and not a "vacation benefit." It therefore does not constitute one of the benefits specified in ERISA § 3(1) and the agreement to pay it is not an "employee benefit plan."[11/]

11/ Petitioner's interpretation of "vacation benefits" does not deprive the term of meaning. In addition to encompassing pooled or aggregated contributions toward employee vacations, and the irrevocable deferral of vacation wages to or beyond the termination of employment (Pet. Br. 38-40), the term also would contemplate the underlying right to be absent from the workplace (whether or not with pay) and such vacation-related benefits as use of a company-owned condominium in a vacation location, the use by employees for vacation of company-earned frequent flyer credits, and perhaps the right to convert a portion of unused sick time into extra vacation days.

Further, for the reasons stated by the Solicitor General (S.G. Br. 16 n.9) and the Ninth Circuit, California Hosp. Ass'n v. Henning, 770 F.2d 856, 861 (9th Cir. 1985), modified, 783 F.2d 946 (9th Cir.), cert. denied, 477 U.S. 904

(footnote continued)

B. The Bank's Agreement to Make Payments For Unused Vacation Time Requires No More Than Ordinary Payroll Administration.

Respondent's analysis assumes that any arrangement that necessitates some activity by the employer to perform his obligations, no matter how minimal that activity might be, is ipso facto a "plan". (Resp. Br. 21-24). This assumption ignores the teaching of Fort Halifax Packing Co., Inc. v. Coyne, No. 86-341, slip op. at 4-5 (June 1, 1987), by failing to acknowledge that not every arrangement for delivery of a benefit

---

(footnote continued)

(1986), respondent's argument (Resp. Br. 14), relying on 29 U.S.C. § 186(c)(6), that a benefit plan delivering vacation benefits must be other than a "pooled" vacation plan is without merit.

enumerated in ERISA § 3(1), is an employee welfare benefit plan. See also ERISA § 514(b)(6)(B) (indicating not all arrangements qualify as a plan, fund or program).

Petitioner contends that the proper inquiry is whether the provision of a particular benefit necessitates administrative activity beyond that which is required to maintain a simple payroll. Ordinary payroll administration is baseline activity that ERISA is not intended to control in any way.

In Fort Halifax, this Court declared that an arrangement that does not by its nature require some ongoing administrative scheme on the part of the employer does not implicate the concerns that prompted preemption and thus is not

a "plan, fund or program." Slip op. at 9. The Court held that the arrangement in Fort Halifax was not a "plan, fund or program" because it required "no administrative scheme whatsoever." Id. The Court did not mean, however, that the employer was a mere observer to a self-executing severance pay statute. Under the Maine statute, the amount of severance pay due was a function of the number of years the employee had worked for the employer and the employee's usual salary, i.e., each employee was due one week's pay for each year more than three that he or she had worked for the employer. Slip op. at 1 n.1, 2-3. Each employer subject to the law therefore was required to (1) keep track of the length of each employee's service, (2) maintain records of each

employee's weekly wage rate, and (3) make payments to each employee at the facility when due.[12/] See id. In other words, the only administrative structure necessitated by the Maine statute was the one already in place to pay wages.

Mass. Gen. L. ch. 149, § 148 (1982) ("§ 148") requires no more administrative activity than did the statute in Fort Halifax. In respondent's own words, all that the Bank is required to do is "to [1] keep track of time earned by each employee, [2] maintain records of time earned and/or saved, and [3] make payments to individual employees

---

12/ Presumably, the employer was also obligated to withhold amounts associated with federal and state income tax, FICA, and any other applicable payroll deductions.

upon termination." (Resp. Br. 23-24).[13/] Hence, this case and Fort Halifax are distinguishable with respect to the level of administrative activity required on the single ground that here the Bank may be called upon to pay accrued vacation pay to different employees at different times, while Fort Halifax's duty to pay affected employees ostensibly arose at only one point in time. See slip op. at 9-10. This distinction, however, is of no moment in terms of the purposes or policies underlying either

---

13/ As aptly noted by the AFL-CIO, if there is any danger of disappointed expectations of employees with respect to pay for unused vacation time, that danger is no different than that which pertains to wages -- a danger Congress chose not to address through ERISA. AFL-CIO Br. 12. See Fort Halifax, slip op. at 12-13 (ERISA is concerned with the abuses associated with the operation of covered administrative schemes).

ERISA in general or § 514 specifically.[14/]

Contrary to respondent's contention (Resp. Br. 22), it is not a meaningful distinction in this case that the Maine statute applies only to employees with no preexisting severance pay agreements while § 148 applies to employers who have agreed to make vacation payments. The distinction is only indirectly relevant to the issue of whether there exists a "plan, fund or program"

14/ Indeed, contrary to dicta in the Court's Fort Halifax opinion, whether under the arrangement at issue a single employer could or could not be called upon at more than one point in time to make the payments at issue could not have been determinative in Fort Halifax. For, even there, any employer with more than one "covered facility" in the state would be called upon on more than one occasion to calculate and pay severance pay if it subsequently closed another one of its facilities. See Fort Halifax, slip op. at 1 n.1.

pursuant to ERISA § 3(1). In the context of the "plan" discussion, the fact that the Maine statute applied only to employers without preexisting plans was significant only because the employer was not forced to modify its policies in order to comply with potentially different state-mandated administrative requirements.

The Bank, similarly, is not forced to modify its agreement in order to comply with § 148. Section 148 requires that vacation wages be paid either immediately upon discharge, on the next regular pay day after an employee voluntarily leaves employment, or within six or seven days of the end of the pay period. Under the Bank's agreement, as reflected by the record in this case, pay for unused vacation time was due presumably on demand. Thus, the

distinction between this case and Fort Halifax is a distinction without a difference for purposes of deciding whether the Bank's agreement is a "plan."

The determinative fact in this case is that the Bank's agreement requires it to do absolutely nothing administratively that it would not have to do in any event to pay employees their salaries or wages, which, as all parties agree, are entirely outside of ERISA's reach. The Bank's agreement therefore does not constitute a "plan, fund or program" within the meaning of ERISA § 3(1).[15/]

15/ Contrary to respondent's suggestion (Resp. Br. 31-32), a prosecution under § 148, as opposed to a civil suit by an employee, does not result in payment of promised wages to the employee. The terms of the statute do not authorize such payments nor does it establish the Commonwealth as an employee's collection

(footnote continued)

II. A GENERALLY APPLICABLE CRIMINAL LAW NEED NOT BE ONE OF UNIVERSAL APPLICATION.

Although there is superficial agreement among the participants that the phrase "generally applicable criminal law" found in ERISA § 514(b)(4) is properly interpreted to mean: a criminal law which is not specifically aimed at employee benefit plans,[16/] respondent

---

(footnote continued)

agent. Rather, by authorizing the assessment of fines or imprisonment, it seeks to deter employer conduct that can cause social dislocation. The observation that § 148 may increase the likelihood that a worker will get what he or she is promised is not a reason for concluding that the statute is nothing more than a benefit collection device.

16/ See Resp. Br. 28, quoting Commonwealth v. Federico, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377-78 (1981);

(footnote continued)

and the Solicitor General suggest by example a test for determining what is a "generally applicable criminal law" that

---

(footnote continued)

S.G. Br. 24; St. Br. 13. Indeed, the Department of Labor repeatedly has interpreted "generally applicable criminal law" under § 514(b)(4) to mean a law that is not intended to apply specifically to ERISA benefit plans. See, e.g., Department of Labor ERISA Opinion Letter No. 84-06A (January 17, 1984) (Colorado Consumer Credit Code imposing criminal penalties upon certain lenders for willfully making loans at usurious interest rates is a generally applicable criminal law, even though it could be applied to loans made from ERISA-covered trust funds, because it is "not intended to apply specifically to activity related to employee benefits plans"); Department of Labor ERISA Opinion Letter No. 79-35A (May 31, 1979) (Massachusetts Health, Welfare and Retirement Funds' Law is not a generally applicable criminal law because it is applicable "only to employee welfare and pension benefit plans"). The lower courts have done likewise. See, e.g., Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1494-95 (D. Conn. 1986) and cases cited therein.

would give the § 514(b)(4) exemption such narrow scope as to render it virtually meaningless. The petitioner's proposed test (Pet. Br. 66), in contrast, gives content to and is consistent with the intended purpose of § 514(b)(4).

The respondent and apparently the Solicitor General suggest that only statutes that are applicable to every single citizen of a state, i.e., are universally applicable, are saved from preemption by § 514(b)(4). (See Resp. Br. 27; S.G. Br. 25-26).[17/] Under this reasoning, however, not even a criminal law prohibiting embezzlement, which respondent, the Solicitor General,

---

17/ Cf. Commonwealth v. Federico, 383 Mass. at 490, 419 N.E.2d at 1378 (stating that a theft statute "applicable to the entire population" qualifies under § 514(b)(4)).

and all courts that have addressed this issue agree should be saved from preemption, would be "a generally applicable criminal law."[18/] Only the class of citizens in positions of trust with respect to the appropriated property can be guilty of embezzlement; such a relationship is a necessary element of the crime. See generally Black's Law Dictionary 468-69 (rev. 5th ed. 1979).[19/] Thus, the fact that

---

18/ See Resp. Br. 28-29; S.G. Br. 23-24; Pet. Br. 64; see also Sforza v. Kenco Contracting, Inc., 674 F. Supp. at 1495 and cases cited therein.

19/ Indeed, often there are separate embezzlement statutes to be applied to different categories of citizens. See, e.g., Mass. Gen. L. ch. 266, § 32 (embezzlement by captain of vessel), § 56 (embezzlement by brokers), § 57 (embezzlement by conservators and fiduciaries); see also 18 U.S.C. § 663 (embezzlement by solicitation), § 665

(footnote continued)

§ 148 is applicable to a group of citizens comprised of fewer than all citizens, e.g., employers only, cannot be decisive of the issue of whether it is a "generally applicable criminal law."

Nor should the fact that § 148 is addressed specifically to the

---

(footnote continued)

(theft or embezzlement from manpower funds). Under respondent's rationale, none of these statutes would qualify as a "generally applicable criminal law," yet a single statute prohibiting embezzlement in each of the contexts covered by the individual statutes would. To conclude that preemption is avoided simply because the state legislature chose to enact one general embezzlement statute or, alternatively, to leave the matter to common law would be to attribute to Congress a concern only with the form rather than the substance of state criminal statutes, and would ignore the fact that the § 514(b)(4) exemption by its terms is not limited to state common law.

employer-employee relationship be controlling here. ERISA does not govern all aspects of the employer-employee relationship. It does not, for instance, regulate the payment of wages or the hiring or firing of employees. To interpret § 514(b)(4) to exclude from its coverage any and every law specifically directed at the employer-employee relationship, or at employers as a class, therefore would be wholly divorced from the purposes of ERISA.

The Solicitor General suggests that if the Bank's agreement is an ERISA plan then § 148 must not be a "generally applicable criminal law."[20/] The

---

20/ See S.G. Br. 29 ("State laws such as these, if applied to employee benefit plans . . ." would defeat the goal of ERISA) (emphasis added); see also id. 23-24.

Solicitor General fails, however, to explain why such an "if applied" analysis would not lead to preemption even of larceny and embezzlement laws, which he concedes should be saved from preemption by § 514(b)(4) (see S.G. Br. 23-24), but which certainly can be applied to ERISA plans. Indeed, were the meaning of § 514(b)(4) to be discerned through an "if applied" analysis, then no law otherwise preempted under § 514(a) would ever be exempted from preemption by § 514(b)(4).[21/]

21/ As this Court has noted, a rule of construction that would make § 514(b)(4) superfluous or a nullity must be rejected. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98 (1983) ("It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans").

The petitioner's proposed test avoids the pitfalls created by the alternatives that have been advanced without causing § 514(b)(4) to be overly broad. Under petitioner's test (see Pet. Br. 66), a "generally applicable criminal law" is a law that applies to all members of a class that is so defined that any member of the class could commit the prohibited criminal conduct in a context that would not implicate an ERISA plan.[22/]

22/ Here, because any employer could be found in violation of § 148 for nonpayment of wages without in any way implicating an employee benefit plan, § 148 is a "generally applicable criminal law." In contrast, a statute aimed specifically at the failure to make contributions to a benefit plan or at the failure periodically to disclose assets held in trust for purposes of paying pension, health or disability benefits would not constitute a "generally applicable criminal law."

The respondent and the Solicitor General ask this Court to presume that a statute is not a "generally applicable criminal law" if it can be applied to employee benefit plans.[23/] The petitioner's test, however, is more faithful to the federalism concerns underlying the exceptions to preemption set forth in § 514(b).[24/] Congress, as all parties here agree, intended to allow state criminal laws to operate, even with respect to employee benefit plans, as long as such laws were not specifically aimed at ERISA plans. (See supra at 22). By exempting from preemption generally applicable state criminal laws, as opposed to state civil laws, Congress obviously sought to preserve to the States the power to regulate by criminal law conduct that they cannot regulate by civil statutes. It is highly implausible that Congress would have chosen the relatively unbounded language of § 514(b)(4) if it intended to preserve from preemption only embezzlement and larceny statutes applicable to every single citizen in the state.

23/ The Court below adopted a variation of this same negative presumption by concluding that § 148 is not a law of general application because it can be applied to vacation payments which will "often" be paid pursuant to ERISA plans. See Pet. App. A31-A32.

24/ Even in the context of ERISA's preemption provision, this Court has never abandoned its presumption "that Congress did not intend to pre-empt areas of traditional state regulation." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985); see also Fort Halifax, slip op. at 16 ("ERISA preemption analysis must be guided by respect for the separate spheres of governmental authority preserved in our fe eralist system") (interior quotes omitted).

The Solicitor General's fears about the scope of the test offered by petitioner are unfounded. He speculates that if petitioner's test is adopted state legislatures will attempt to circumvent ERISA's preemption provision by criminalizing nonpayment of wages in a variety of statutes otherwise directed at ERISA plans. (S.G. Br. 24 n.15). This argument presupposes that state legislatures will intentionally manipulate their criminal codes with no real purpose other than to subvert congressional intent. Even were such intentional circumvention a legitimate concern, no test, including respondent's and the Solicitor General's, could prevent its occurrence, unless

§ 514(b)(4) is to be drained of all meaning.[25/]

Second, even if a statute qualifies as a "generally applicable criminal law" and thus is exempted from preemption by § 514(a)'s "occupation of the field," that same statute is not thereby immunized from preemption under an "actual conflict" analysis. An "actual conflict" occurs when compliance with both federal and state law is impossible, Florida Lime & Avocado Growers, Inc. v.

25/ For example, if the respondent's or the Solicitor General's test were adopted, a state legislature could presumably avoid preemption by enacting a criminal statute that provides: Any person who appropriates the property of another by any means, including, but not limited to, the failure to make promised contributions to a benefit plan, is guilty of larceny. Such a statute, although motivated by the legislature's desire to circumvent ERISA, would escape preemption because it would apply to all citizens in the state and be a single general larceny statute.

Paul, 373 U.S. 132, 142-43 (1963), or when state law stands as an obstacle to the objective of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941). No such conflict exists between § 148 and ERISA. Employers can comply both with § 148's requirements regarding payment of wages and ERISA's requirement of payment of benefits due within a reasonable time. See 29 C.F.R. § 2560.503-1(e)(3).

In addition, a statute like § 148 is consistent with the congressional purpose of assuring that employee expectations of receiving promised benefits are realized. Nor do the criminal penalties imposed pursuant to "generally applicable criminal law" necessarily stand as an obstacle to the "exclusivity" objective of ERISA. Any

"generally applicable criminal law" will, by definition, supplement ERISA's civil provisions. Thus, the Solicitor General's observation (S.G. Br. 26-27) that § 148 will result in a greater likelihood that a worker will get the benefits he or she is promised -- a result that could be effected by a private enforcement action under ERISA -- is not a reason for preempting the statute. Section 148 is no more an impermissible supplement to ERISA's provisions than is a generally applicable embezzlement statute that could be applied to punish misappropriation of pension funds.

CONCLUSION

The Commonwealth of Massachusetts respectfully requests that the decision below of the Supreme Judicial Court of Massachusetts be reversed and that this Court rule that ERISA does not preempt the Commonwealth from prosecuting respondent pursuant to Mass. Gen. L. ch. 149, § 148.

Respectfully submitted,

JAMES M. SHANNON
Attorney General
Commonwealth of Massachusetts

RUTH A. BOURQUIN
MARC C. LAREDO*
CARL VALVO
Assistant Attorneys General
One Ashburton Place, Room 1811
Boston, MA 02108
(617) 727-2200 ext. 2818

*Counsel of Record

No. 88-32

(6)

In the Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

RICHARD N. MORASH

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

BETTE J. BRIGGS
EDWARD D. SIEGER
Attorneys
Department of Labor
Washington, D.C. 20210

35pp

QUESTIONS PRESENTED

1. Whether an employer's agreement to pay departing employees for accrued vacation time from the employer's general assets, rather than from a trust fund, constitutes an "employee welfare benefit plan" under Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(1).

2. Whether, if such an agreement is a welfare benefit plan covered by ERISA, prosecution under a Massachusetts criminal statute that penalizes the nonpayment of vacation benefits is preempted by ERISA's broad preemption provision, or rather is saved from preemption as within the exception of Section 514(b)(4) of ERISA, 29 U.S.C. 1144(b)(4), for generally applicable criminal laws of a state.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-32

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

RICHARD N. MORASH

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

At issue in this case is the interpretation and validity of a Department of Labor regulation, 29 C.F.R. 2510.3-1(b), defining the coverage of Title I of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. (& Supp. IV) 1001 *et seq.* That regulation identifies certain "payroll practices" that are not "employee welfare benefit plan[s]" covered by the statute, and the practices include vacation payments made from an employer's general assets rather than from a trust fund. As a consequence of being outside the scope of ERISA, state laws relating to such payroll practices are not preempted under the general preemption provision of ERISA, Section

514(a), 29 U.S.C. 1144(a). The Massachusetts Supreme Judicial Court in this case adopted an interpretation of the payroll practices regulation limiting its application in a manner inconsistent with the Secretary of Labor's construction of that regulation. The Secretary of Labor has a substantial interest in urging what she views as the correct interpretation of the Department's regulation in this case.

The Secretary also has an interest in the second issue raised by this case—which needs to be addressed only if the Court rejects the Department's interpretation of the payroll practices regulation. Having found post-termination vacation payments made out of general assets to constitute a "welfare plan" covered by ERISA, the court below further held that the Massachusetts criminal statute at issue (Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976 & Supp. 1988)) does not come within the exception to ERISA preemption for generally applicable state criminal laws (§ 514(b)(4), 29 U.S.C. 1144(b)(4)). The Secretary is charged with enforcing the reporting and disclosure requirements and the fiduciary obligations that Title I of ERISA imposes on administrators of employee benefit plans covered by the Act, and therefore has a substantial interest in the proper resolution of that issue. She agrees with the conclusion of the court below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(1) of the Employee Retirement Income Security Act, 29 U.S.C. 1002(1), provides:

> For purposes of this subchapter:
>
> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or

> program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).[1]

Section 514 of ERISA, 29 U.S.C. (& Supp. IV) 1144, provides, in pertinent part:

> (a) Except as provided in subsection (b) of this subsection, the provisions of this chapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *.
>
> (b) * * *
>
> * * * * *
>
> (4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

---

[1] The cross-reference is to Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c), which recognizes an employee benefit plan exception from the restrictions otherwise imposed on financial transactions between employers and employees or their representatives. That section lists, in addition to many of the same benefits enumerated in Section 3(1) of ERISA, "pooled vacation, holiday, severance or similar benefits."

The payroll practices regulation, 29 C.F.R. 2510.3-1, provides, in pertinent part:

> (b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> * * * * *
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons[.]

Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976 & Supp. 1988) provides, in pertinent part:

> Every person having employees in his service shall pay weekly each such employee the wages earned by him * * *; and any employee discharged from such employment shall be paid in full on the day of his discharge * * *. The word "wages" shall include any holiday or vacation payments due an employee under an oral or written agreement.

STATEMENT

1. A Massachusetts criminal law, Mass. Ann. Laws ch. 149, § 148 (Law. Co-op. 1976 & Supp. 1988), requires employers to pay in full to any discharged employee, on the day of discharge, all wages

earned by the employee, including "any holiday or vacation payments due an employee under an oral or written agreement." For purposes of the statute, the president of a corporation is deemed to be the employer of the corporation's employees (*ibid.*). Failure to comply is punishable by a fine of $500 to $3,000 or imprisonment for up to two months, or both (*ibid.*).

In May 1986, petitioner, the Commonwealth of Massachusetts, issued two complaints in the Boston Municipal Court against respondent, Richard N. Morash, president of the Yankee Bank for Finance and Savings (Pet. App. A4-A8). The complaints alleged that Morash had failed to compensate two discharged bank vice presidents for unused vacation days (*id.* at A7-A8). It is undisputed that, upon termination of their employment, bank employees who have accrued vacation time are entitled to receive a lump-sum cash payment from the bank's general assets for the unused vacation time (*id.* at A9).

Morash moved to dismiss the complaints on the ground of federal preemption (Pet. App. A5-A6). He argued that the bank's vacation policy constitutes an "employee welfare benefit plan" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(1), and that the state's prosecution for failure to make vacation payments therefore runs afoul of Section 514(a) of ERISA, 29 U.S.C. 1144(a), which expressly preempts "any and all State laws insofar as they * * * relate to any employee benefit plan." Pursuant to the procedure in Mass. R. Crim. P. 34 for resolving an "important or doubtful" "question of law," the trial judge reported the question to the

Massachusetts Appeals Court for decision, and the Massachusetts Supreme Judicial Court sua sponte accepted the case for direct appellate review (Pet. App. A4).

2. The Supreme Judicial Court of Massachusetts held that ERISA preempts the state's prosecution of Morash (Pet. App. A32).

a. The court first focused on a Department of Labor regulation, 29 C.F.R. § 2510.3-1(b)(3), which provides that numerous "payroll practices," including the payment of vacation benefits "out of [an] employers' general assets" rather than from a trust fund, are not "employee welfare benefit plan[s]" within the meaning of ERISA.[2] It noted that in *Barry* v. *Dymo Graphic Systems, Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985), it had "interpreted the Department of Labor regulation as applying only to an employer's discretionary practices and not to those contractually required" (Pet. App. A12). In so concluding, the court in *Barry* had relied upon the district court's decision in *California Hosp. Ass'n* v. *Henning*, 569 F. Supp. 1544 (C.D. Cal. 1983), rev'd, 770 F.2d 856 (9th Cir. 1985), cert. denied, 477 U.S. 904 (1986), which noted that ERISA Section 3(1), 29 U.S.C. 1002(1), lists "vacation benefits" within the definition of "employee welfare benefit plan[s]"

[2] The Department of Labor promulgated the payroll practices regulation to distinguish payments that are like wages, which are not governed by ERISA, from the employee benefits that are covered by the federal statute. 40 Fed. Reg. 24642-24643 (1975). As a consequence of being defined as a payroll practice rather than as a welfare plan, a practice is outside the scope of ERISA's coverage, and state laws relating to such a practice are not preempted by Section 514(a).

covered by ERISA, and concluded that "'[i]f that regulation does indeed intend ERISA exemption of every unfunded vacation program, it is at clear odds with language of the statute itself'" (569 F. Supp. at 1546 (quoted in *Barry*, 394 Mass. at 837, 478 N.E.2d at 712)).

The court below next concluded that it "need not decide" whether to modify its interpretation of the regulation in light of the Ninth Circuit's reversal of the district court decision in *California Hosp. Ass'n* (Pet. App. A13). The court found *California Hosp. Ass'n* to be distinguishable as dealing with "an employer's payments of compensation out of general assets to an employee *while he or she is on vacation*," rather than "a lump-sum payment for unused vacation time upon discharge" (*ibid.* (emphasis by the court)).[3] Payments of vacation benefits following termination of employment, the court below held, "are more akin to severance pay than to ordinary wages" (*ibid.*), and, unlike wages, severance pay is plainly governed by ERISA (*Holland* v. *Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), aff'd, 477 U.S. 901 (1986); *Gilbert* v. *Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), aff'd, 477 U.S. 901 (1986)).[4]

[3] In fact, contrary to the assumption of the court below, the issue in *California Hosp. Ass'n* was whether a California statute requiring the payment of accrued vacation time *on termination* was preempted. See 770 F.2d at 858.

[4] The court below also rejected Massachusetts' argument that the bank's vacation policy, like the state-mandated plant-closing benefits at issue in *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987), involves a *benefit* as opposed to an employee benefit *plan*, and therefore is not covered by

b. Having decided that the vacation pay practices in issue constitute a welfare plan (Pet. App. A20), the court further concluded that the Massachusetts statute "relates to" such a plan within the meaning of ERISA's preemption provision. The court explained that "the statute as applied represents an attempt by the State to enforce the provisions of the plan," and concluded that "State laws that attempt to enforce benefit plans are preempted" (Pet. App. A23 (citation omitted)). The court further held that the Massachusetts statute is not saved from preemption by the proviso in Section 514(b)(4) of ERISA that no "generally applicable criminal law of a State" is preempted. That provision, the court stated, is " 'directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example.' " Pet. App. A27 (quoting *Commonwealth* v. *Federico*, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377 (1981)). Here, the court concluded that "[b]ecause our statute is limited to the nonpayment of 'wages' by an employer to an employee, including agreed-upon vacation payments which will often be funded from 'employee benefit plans,' " it "is not so general as to fall within the exception to preemption provided by Congress" in Section 514(b)(4) (Pet. App. A31-A32).

ERISA. The court noted that this Court's holding in *Fort Halifax* that there was no "plan" turned on a finding that the state law mandated " 'a one-time lump-sum payment triggered by a single event' " (Pet. App. A16 (quoting *Fort Halifax*, slip op. 9)). By contrast, the court concluded, the bank's vacation policy necessitated "a periodic demand for adequate funds to meet commitments" (Pet. App. A18).

SUMMARY OF ARGUMENT

1. It is clear from both the text and the legislative history of ERISA that Congress was concerned with regulating and assuring payment of certain types of benefits promised to employees, and that it was particularly concerned with abuses relating to trust funds established to provide employee benefits. It is equally clear that Congress in ERISA was not addressing problems related to the payment of ordinary cash wages from an employer's general assets. In light of ERISA's focus on benefits rather than wages and Congress's particular concern with trust fund abuses, the Secretary of Labor by regulation (29 C.F.R. 2510.3-1(b)) interpreted the Act's definitional provisions to exclude from the Act's coverage routine employer payroll practices, including vacation leave paid directly from general assets rather than from a trust fund. The Secretary's interpretation of the statute is consistent with the language, history, and purposes of the Act, and is entitled to deference as a reasonable and permissible construction of the statute by the agency entrusted with its administration. The construction of the court below, in contrast, would impose unnecessary regulatory burdens on every employer providing paid vacation leave, and would allow any employee complaining that he was improperly denied vacation benefits to bring suit in federal court.

The Massachusetts Supreme Judicial Court erroneously concluded that a lump-sum payment from general assets for unused vacation time upon discharge is covered by ERISA because it is more like severance pay, a type of benefit Congress unquestionably intended ERISA to cover, than like ordinary

wages. While any payment received by an employee upon termination of employment superficially resembles severance pay simply by virtue of its timing, there is no reason why vacation payments made from general assets should be covered or not covered under ERISA depending on whether made during or at the end of one's term of employment. Unlike severance pay, which is payable solely upon the contingency of termination of employment, vacation wages generally are payable throughout the employment relationship and are not contingent upon discharge or separation. And, in contrast to severance pay, which is invariably an added payment above and beyond ordinary wages, accrued vacation leave is a component of ordinary wages.

2. If we are correct in viewing respondent's vacation benefits as payroll practices rather than as a welfare plan, then Massachusetts is free to prosecute respondent for failing to pay the benefits promised. If, on the other hand, we are incorrect on that point, the Court must then construe ERISA's general preemption provision and its exception for generally applicable criminal laws. We agree with the court below that ERISA's preemption clause, Section 514(a), which expressly supersedes "any and all State laws insofar as they * * * relate to" plans covered by the statute, bars Massachusetts' prosecution of the bank for failure to pay vacation benefits. The acknowledged purpose of this prosecution is to enforce the bank's vacation leave policy, so the statute plainly "relate[s] to" the plan.

The Massachusetts wage payment statute, which imposes criminal penalties for nonpayment of vacation benefits, is not saved by Section 514(b)(4),

ERISA's exception to preemption for "generally applicable" state criminal laws. The statute is aimed specifically at the non-payment of wages and certain fringe benefits, and, like the court below, we think that Congress did not mean to save such narrowly-focused statutes from preemption. Rather, Congress had in mind more broadly-based statutes such as those prohibiting fraud or embezzlement. If a law aimed specifically at employee benefits is saved from preemption by Section 514(b)(4), then it is not clear what kind of criminal law is not "generally applicable."

In addition, as the court below stated, the statute at issue plainly provides an alternative means by which employees may seek to obtain benefits. In *Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), however, this Court stressed that ERISA's comprehensive civil enforcement provisions were intended to provide the exclusive means for challenging benefit denials. Furthermore, as this Court has explained, ERISA's preemption provision was designed to eliminate the threat of conflicting and inconsistent state and local regulation. *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987), slip op. 6. If statutes such as the Massachusetts law at issue are not preempted, states will be able to impose conflicting and inconsistent requirements on employee benefit plan administrators.

ARGUMENT

I. AN AGREEMENT TO PAY ACCRUED VACATION BENEFITS UPON TERMINATION OF EMPLOYMENT, FROM AN EMPLOYER'S GENERAL ASSETS, IS NOT A WELFARE PLAN GOVERNED BY ERISA

Congress enacted ERISA to correct "two principal abuses: mismanagement of funds accumulated to finance * * * benefits, and failure to pay employees the benefits promised" (*California Hosp. Ass'n*, 770 F.2d at 859)). Prior to ERISA's enactment, the Secretary of Labor testified in detail with respect to abuse of trust funds, listing 22 examples of mismanagement drawn from both pension and welfare funds. *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H. R. 1046, and H.R. 16462 Before the Subcomm. on General Labor of the House Comm. on Education and Labor*, 91st Cong., 1st & 2d Sess. 470-472 (1970).[5] Concerns about such abuses led Congress to impose strict fiduciary duties on plan administrators. See 120 Cong. Rec. 4277 (1974) (statement of Rep. Perkins) (citing "breaches of faith and self-dealing on the part of fund trustees and administrators"); 119 Cong. Rec. 30004 (1973) (statement of Sen. Williams) (citing "embezzlement and bribery" involving trust funds).

[5] Secretary Schultz cited, among the 22 examples of abuse, "a jointly-administered welfare and retirement fund * * * [that] deposited 67 million dollars in a non-interest-bearing account in a bank that was controlled by the union which was a party to the collective bargaining agreement setting up the fund." He also cited a welfare plan providing medical benefits that paid 50 cents in administrative costs for every dollar of benefits "due in part to the excessive fees paid to the fund trustees." *Private Welfare and Pension Plan Legislation Hearings, supra*, at 472.

Congress was not concerned, in enacting ERISA, with regulating wages. Other federal laws, such as the Fair Labor Standards Act of 1938, 29 U.S.C. 218, govern wages, and, unlike ERISA, "do not seek to impose national uniformity through a broad preemption provision, but instead permit the states to provide more stringent protections if they wish" (*California Hosp. Ass'n*, 770 F.2d at 861). In light of ERISA's inapplicability to wages, and in response to numerous inquiries, the Secretary of Labor, who has authority to prescribe regulations "necessary or appropriate to carry out the provisions of [Title I of ERISA]" (29 U.S.C. 1135), promulgated the payroll practices regulation less than a year after ERISA was enacted in order "to resolve some of the questions of coverage which have been raised" as to the meaning of "employee benefit plan" (40 Fed. Reg. 24642 (1975)).

Recognizing that Congress had listed "vacation benefits" among the "welfare plans" enumerated in Section 3(1), that it was especially concerned with trust fund abuses, and that it did not intend to regulate wages, the Secretary concluded through the payroll practices regulation that vacation benefits paid out of general assets rather than through a trust fund are not governed by the statute.[6] As the Secretary explained when the regulation was proposed: "[P]aid vacations * * * are not treated as employee benefit plans because they are associated with regular wages

[6] Among the other payroll practices listed in the regulation are the payment of weekend premiums, the giving of holiday gifts, and scholarship programs where payments are made from the employer's general assets rather than from a trust fund. 29 C.F.R. 2510.3-1(b)(1), (d), and (k).

or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage." 40 Fed. Reg. 24642-24643 (1975). Thus, under the regulation, the payment of vacation benefits from a trust fund, which is a common practice where employees typically work for many employers in a single year, as do construction workers (see *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 4 & n.2 (1983)) and longshore workers (see *Mackey* v. *Lanier Collection Agency & Serv. Inc.*, No. 86-1387 (June 17, 1988), slip op. 1), is subject to ERISA. But otherwise the payment of vacation benefits is governed by state law.

Noting that Section 3(1) lists "vacation benefits" among the types of welfare plans governed by ERISA, the Massachusetts Supreme Judicial Court in *Barry* concluded that the payroll practices regulation is " 'at clear odds with language of the statute itself and an invalid arrogation of power by the Department' " (394 Mass. at 837, 478 N.E.2d at 712 (quoting *California Hosp. Ass'n*, 569 F. Supp. at 1546)).[7] However, the statutory provision does not state that *all*

[7] Two courts of appeals have also concluded that vacation benefits paid from an employer's general assets are governed by ERISA. In *Holland* v. *National Steel Corp.*, 791 F.2d 1132, 1135 (1986), the Fourth Circuit concluded that the payroll practices regulation is inconsistent with the plain meaning of the statutory definition of "employee welfare benefit plan," and in *Blakeman* v. *Mead Containers*, 779 F.2d 1146 (1985), the Sixth Circuit concluded, without citation of the payroll practices regulation, that a vacation pay plan was covered by ERISA.

vacation benefits are subject to federal regulation under ERISA. Nor does the statute define "vacation benefits." And the assertion that the payroll practices regulation is an "arrogation of power" by the Secretary of Labor is rather peculiar, since the consequence of the regulation is to remove the enumerated practices from the scope of the Secretary's authority.[8]

Two courts of appeals that have considered the treatment of vacation benefits in the payroll practices regulation have concluded that it is "a reasonable and permissible construction of the statute to exclude from its coverage * * * programs providing for the traditional vacation during which the employee continues to receive ordinary wages paid from the general assets of the business." *California Hosp. Ass'n*, 770 F.2d at 859; accord *Shea* v. *Wells Fargo Armored Serv. Corp.*, 810 F.2d 372, 376 (2d Cir. 1987). As the Ninth Circuit pointed out in *California Hosp. Ass'n*, the Department's regulation reasonably distinguishes vacation "payroll practices"

[8] Contrary to the suggestion of the Massachusetts Supreme Judicial Court in *Barry* (see page 6, *supra*), the payroll practices regulation cannot be construed as limited to informal vacation benefit programs, as distinguished from plans established by contract. Rather, as the court below correctly stated, "neither a formal, written plan nor a separate fund is a prerequisite to the establishment or maintenance of an ERISA employee benefit plan" (Pet. App. A11-A12); otherwise, employers could exempt plans from ERISA's coverage by failing to comply with its requirements. Moreover, the Secretary plainly intended to exempt all vacation plans where benefits are paid from general assets from ERISA's coverage, as nothing in the regulation or the Secretary's explanation of its purpose suggests that it would not exempt vacation benefits mandated by contract from the scope of the statute.

from ERISA-covered "vacation benefits" based both on the close affinity between paid vacation leave and ordinary cash wages and on the absence of a separate fund (770 F.2d at 862). Congress did not intend to make ERISA a vehicle for regulating ordinary wage practices, but instead sought to regulate the wide variety of fringe benefit programs that had developed since World War II (see S. Rep. 93-127, 93d Cong., 1st Sess. 3 (1973); H.R. Rep. 93-533, 93d Cong., 1st Sess. 2-4 (1973)). As the Ninth Circuit correctly concluded, the payroll practices described in the regulation are " 'easily analogized to ordinary wages.' " *California Hosp. Ass'n*, 770 F.2d at 860 (quoting *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985)). The continuation of an employee's salary while he is on vacation is particularly hard to distinguish from ordinary wages, and it is reasonable to treat those same vacation benefits no differently when they are paid at the termination of employment.[9]

Moreover, the "inclusion of routine vacations-with-pay within ERISA [would] contribute nothing to the

[9] The Ninth Circuit correctly rejected the argument that Congress, through its cross-reference in Section 3(1) to the benefits described in 29 U.S.C. 186(c)(6) (which mentions, inter alia, *pooled* vacation benefits), incorporated separately funded vacation benefit plans, and so, unless it intended to repeat itself, must have meant by its reference to vacation benefits in Section 3(1) to include vacation benefit plans where benefits are paid from an employer's general assets. That simply reads too much into the structure of Section 3(1). As the court stated in *California Hosp. Ass'n*: "Many of the benefits incorporated in section [3(1)] by the cross-reference to section 186(c) are already found in section [3(1)]. Thus it is evident that Congress was not concerned with duplication, but only with assuring that all benefits covered by section 186(c) were also covered by section [3(1)]." 770 F.2d at 861.

solution of the problems Congress sought to solve" (*California Hosp. Ass'n*, 770 F.2d at 860). As the Ninth Circuit pointed out, "[t]raditional vacations during which the employer continue[s] to pay the employees' regular wages present[] neither of the evils Congress intended to address" (*id.* at 859). Since vacation wages, like ordinary wages, are generally paid in cash from the employer's business resources, "[t]here is no fund to administer and no special risk of loss or nonpayment" (*ibid.*). The regulations do include within ERISA's coverage plans establishing trust funds for the payment of vacation leave because such plans raise one of Congress's concerns in enacting ERISA—the mismanagement of benefit funds. The Department's interpretation of the statute to cover vacation benefits paid from trust funds is consistent with the significant historical fact of which Congress was undoubtedly aware that collectively-bargained vacation benefit funds have long been the practice in a number of industries, most notably construction and longshoring (see page 14, *supra*). It was certainly reasonable for the Department, in construing "vacation benefits" in Section 3(1) of ERISA, to keep in mind Congress's likely concern with these specialized vacation benefit programs.[10]

Finally, as the Ninth Circuit recognized, inclusion of routine paid vacations within ERISA would "im-

[10] That is not to say that the existence of a trust fund is a prerequisite to coverage under ERISA. It is clear that, in the case of payments that are not analogous to wages, such as severance benefits, an employer's promise to pay the benefits from the employer's general assets establishes a plan subject to ERISA. See *Holland* v. *Burlington Indus.* and *Gilbert* v. *Burlington Indus.*

pose a substantial and needless burden upon employers and the federal courts." Employers would be subject to "numerous statutory requirements for formulating plans, establishing procedures, giving notices, and filing reports." 770 F.2d at 860-861 (citing 29 U.S.C. (& Supp. IV) 1022, 1022(b), 1024(a)(1), 1024(a)(2)(A), 1024(b), 1026(a), and 1133(1) and (2)). In addition, "[a]ny employee claiming denial of vacation leave could sue his employer in federal court" (*id.* at 861, citing 29 U.S.C. 1132(a)). Certainly, "[i]t is unlikely Congress intended to create burdens of this magnitude without evidence of need, and without comment" (770 F.2d at 861). See also *National Metalcrafters* v. *McNeil*, 784 F.2d 817, 823 (7th Cir. 1986) (declining to decide whether ERISA preempts a state's attempt to enforce a vacation plan, but noting that a ruling in favor of preemption "could bring a host of trivial cases into the federal courts"). Based on the purposes and legislative history of the statute, and given the "substantial and needless burden" that would be imposed by including paid vacations within ERISA, the Department's payroll practices regulation, which was adopted less than one year after ERISA was enacted, is a reasonable, contemporaneous construction of the statute which is entitled to deference by the courts. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); see also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The court below erroneously concluded that because the vacation payments at issue in this case would be received after termination of employment, they more closely resemble severance benefits than ordinary wages, and therefore fall outside the payroll practices regulation (Pet. App. A13). The Department

of Labor has interpreted its payroll practices regulation to exclude from ERISA's coverage all vacation benefits paid from general assets, including earned but unused vacation days, irrespective of when the payment is made. See Gov't Amicus Br. in Opp. at 9 n.5 in *California Hosp. Ass'n* v. *Henning*, No. 85-1648.[11] This is a sensible approach, since there is no good reason to view the character of vacation benefits as changing merely because they are paid upon termination of employment.[12] As the Second Circuit explained in *Shea*, where the vacation wages available to employees are not "contingent upon termination of employment or severance," but are payable whether or not employment continues, "[t]he conclusion is inescapable that [there is] no payroll *severance* policy" (810 F.2d at 377 (emphasis added)).

From the standpoint of the sponsoring employer, a traditional vacation policy is intended to provide employees with a respite during the course of employment; such a policy cannot be said to be "established or maintained * ** for the purpose of providing" severance benefits (29 U.S.C. 1002(1)). If an employee accrues vacation time and collects payment upon termination of employment, the entitle-

---

[11] We have served a copy of our brief in *California Hosp. Ass'n* on the parties to this case.

[12] Only where a plan permitted employees to make an irrevocable deferral of vacation benefits, which were then available only upon termination of employment or, in the employer's discretion, upon demonstration of an immediate financial emergency, has the Department found that a plan in effect provided severance benefits as opposed to vacation pay. See *American Motors Corp.*, Advisory Op. 81-55A (Labor Dep't June 26, 1981).

ment still arises on account of the vacation benefit policy.[13] Even where there is an incentive for employees to delay taking vacations—to earn a greater return when leave is taken at a higher salary, or to provide a cushion in the event of layoff or termination of employment—the fundamental purpose and character of the benefit as periodically accrued vacation compensation does not change. See *Blue Cross & Blue Shield*, Advisory Op. 79-48A (Labor Dep't July 30, 1979) (accumulated paid sick leave is not the type of "benefit[] in the event of sickness" (29 U.S.C. 1002(1)) that Congress intended ERISA to cover). See also *Abella* v. *W.A. Foote Memorial Hosp. Inc.*, 557 F. Supp. 482 (E.D. Mich. 1983), aff'd per curiam, 740 F.2d 4 (6th Cir. 1984) (to the same effect regarding accumulated paid sick leave provided during the term of employment). Indeed, even should the employer offer an inducement to employees *not* to use their accumulated leave during some particular period, such inducement is not among the benefits covered in the Act. The payroll practices regulation

[13] The payroll practices regulation refers to "[p]ayments of compensation while an employee is on vacation." Contrary to the conclusion of the court below (Pet. App. A13), the Secretary did not intend by that language to require that a vacation plan provide that an employee must work for an employer both before and after a period for which vacation benefits are paid, or the plan would be deemed to be a severance pay plan. An employee may reasonably be viewed as being "on vacation" from an employer upon termination of employment. From the employer's perspective, it would make little difference if the employee returned to work for one day and then terminated the employment relationship; the primary difference would be that the employer would pay the employee periodically if he were returning to work, rather than in a lump sum. That difference does not transform a vacation benefit into a severance benefit.

specifically provides, with respect to vacation benefits, that the "payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons" is not an employee benefit governed by ERISA. If a premium paid to induce an employee to accrue vacation leave rather than take a vacation at an inconvenient time for the employer is not a welfare benefit, then the accrued vacation benefit should not be deemed to have been transformed into a severance benefit merely because it is collected upon termination of employment.

In sum, the Department's interpretation recognizes that vacation leave paid from an employer's general assets is simply a form of wages which, if not used during the life of the employment relationship, may be collected upon its termination. Because the Department's interpretation is consistent with the purposes and policies of the payroll practices regulation and the statute under which the regulation was promulgated, it is entitled to deference by the Court. *Northern Indiana Pub. Serv. Co.* v. *Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975) (per curiam). See also *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (in construing administrative regulations, the agency's interpretation carries "controlling weight" unless "plainly erroneous or inconsistent with the regulation.") At the very least, in the face of legislative or regulatory silence, "caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).[14]

[14] Massachusetts also argues that, under the rationale of *Fort Halifax* (see note 4, *supra*), the bank's policy of paying

II. IF THE BANK'S VACATION PAY POLICY IS A WELFARE PLAN GOVERNED BY ERISA, THEN THE MASSACHUSETTS STATUTE IS NOT SAVED FROM PREEMPTION UNDER SECTION 514(b)(4) AS A "GENERALLY APPLICABLE CRIMINAL LAW"

If we are correct in our conclusion that, under the payroll practices regulation, the bank's payment of vacation benefits is not a welfare plan governed by ERISA, then Massachusetts is free to regulate such

---

for unused vacation leave upon termination of employment is not an employee benefit "plan" because it involves only "a one-time lump-sum payment triggered by a single event" and therefore "requires no administrative scheme whatsoever to meet the employer's obligation" (Pet. 22-25 (quoting *Fort Halifax*, slip op. 9)). We agree with the court below that there is no merit to that contention. As this Court explained in *Fort Halifax*, payments that are triggered by predictable and recurring events "may represent a one-time payment from the perspective of the beneficiaries, * * * [but] the employer clearly foresees the need to make regular payments * * * on an ongoing basis," and this "ongoing, predictable * * * obligation * * * creates the need for an administrative scheme to process claims and pay out benefits" (slip op. 12 n.9). Here, the bank's policy creates the need for an administrative scheme to pay accrued vacation benefits on an ongoing basis, since employees may terminate their employment and demand payment at any time.

This contrast between *Fort Halifax* and this case is illuminated by the discussion in the opinion in *Fort Halifax* of the severance pay plan at isue in *Holland* v. *Burlington Indus.* and *Gilbert* v. *Burlington Indus.*, where the courts held that an employer's promise to make severance payments from its general assets is a welfare plan covered by ERISA. There, this Court explained, " '[t]he employer had made a commitment to pay severance benefits to employees as each person left employment,' " and " '[t]his commitment created the need for an administrative scheme to pay these benefits on an ongoing basis' " (*Fort Halifax*, slip op. 15 n.10 (quoted at Pet. App. A19-A20)).

benefits. Accordingly, its prosecution of respondent for failing to pay the benefits promised would not be preempted. If, on the other hand, we are incorrect and the bank's vacation policy is subject to ERISA, the Court must construe ERISA's general preemption provision and its exception for generally applicable criminal laws to determine whether the prosecution is preempted.

Section 514(a) of ERISA generally preempts any and all state laws that "relate to any employee benefit plan." This Court has explained that a state law " 'relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with *or reference to* such a plan.' " *Mackey*, slip op. 3 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)) (emphasis in *Mackey*). As the court below recognized, the Massachusetts statute sought to be enforced in this case "represents an attempt by the State to enforce the provisions of the plan" (Pet. App. A23). Accordingly, the Massachusetts statute plainly "relate[s] to" the bank's payment of vacation benefits. Thus, if the bank's plan for the payment of vacation benefits out of general assets is governed by ERISA, the Massachusetts statute is preempted under Section 514(a) unless one of ERISA's exceptions applies.

Section 514(b)(4) of ERISA saves "any generally applicable criminal law of a State" from preemption, and Massachusetts contends that it applies here. In our view, however, the Massachusetts statute, which provides that a discharged employee "shall be paid in full on the day of his discharge," including any "vacation payments due," is not a "generally applicable criminal law" within the meaning of Section 514(b)(4). The majority of courts that have con-

sidered the matter have agreed, as the court below noted (Pet. App. A29-A30), that the exception "'seems directed toward criminal laws that are intended to apply to conduct generally—criminal laws against larceny and embezzlement, for example'" (*id.* at A29 (quoting *Federico*, 383 Mass. at 490, 419 N.E.2d at 1377)). The Massachusetts statute at issue does not apply to "conduct generally," but instead governs only the wage and benefit payment practices of employers. We doubt that Congress intended to save laws of such narrow focus.[15]

The legislative history is consistent with the view that only laws regulating general conduct, as opposed to laws specifically aimed at employee benefit plans, are saved from preemption by Section 514(b)(4). In enacting ERISA, the House and Senate both passed bills which generally preempted state laws regulating subject matter governed by ERISA, and neither contained a provision saving state criminal laws from preemption. See H.R. 2, 93d Cong., 1st Sess., § 699 (1973) (Senate); H.R. 2, 93d Cong., 2d Sess., § 514 (1974) (House). Both the broad preemption provi-

[15] In *Joseph W. Kane*, Advisory Op. 79-35A (Labor Dep't May 31, 1979), the Department of Labor opined that a state law prohibiting embezzlement from employee benefit plans, and applying only to such plans, was not a law of general applicability within the meaning of Section 514(b)(4). The Department added that general larceny statutes would be saved from preemption by that provision. The statute at issue here is slightly broader than that at issue in the 1979 advisory opinion, since it applies to wages as well as to certain fringe benefits. That difference does not, in our view, make it a generally applicable statute. A contrary conclusion would allow states to regulate all sorts of employee benefit plans simply by aiming criminal statutes at wages as well as benefits.

sion and the exception for generally applicable criminal laws were added by the Conference Committee (see H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 383 (1974)), whose primary objective was to expand the statute's preemptive effect. A House sponsor described "the reservation of Federal authority * * * to regulate the field of employee benefit plans" in the Conference substitute as the "crowning achievement" of ERISA. 120 Cong. Rec. 29197 (1974) (statement of Rep. Dent). In contrast, there was no indication that the exception for generally applicable criminal laws was to be construed broadly. To the contrary, one of the Senate sponsors stated that "with the *narrow exceptions* specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation[]." *Id.* at 29933 (statement of Sen. Williams (emphasis added)). While they stressed that the preemptive effect of ERISA had been significantly broadened, the sponsors mentioned the exception for generally applicable criminal laws only in passing. *Id.* at 29942 (statement of Sen. Javits).

The minority of courts that have concluded that criminal laws relating to ERISA's subject matter are saved from preemption by Section 514(b)(4) have based that conclusion on the proposition that "a law is of general applicability if it extends to the entire state and embraces all persons or things in a particular class" (*Cairy* v. *Superior Court*, 192 Cal. App. 3d 844, 237 Cal. Rptr. 715, 717 (1987)), a view that originated in *Sasso* v. *Vachris*, 116 Misc. 2d 797, 800-801, 456 N.Y.S. 2d 629, 632 (1982). That interpretation of Section 514(b)(4) is plainly flawed since, under it, almost every state criminal law (and perhaps every such law), would be saved from pre-

emption. *Cairy*, 192 Cal. App. 3d at 844, 237 Cal. Rptr. at 717. It is difficult to think of a state criminal law that applies only in certain portions of a state, or one that governs only certain persons in the particular class at which the law is aimed; at the least, such laws are highly unusual. Such a construction would allow substantial involvement in the regulation of benefit plans by means of state criminal provisions aimed specifically at the performance of functions unique to such plans. That result would significantly erode the general purpose of ERISA to serve as the exclusive and comprehensive source of benefit plan regulation.

More specifically, this Court held in *Pilot Life Ins. Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op. 10, that "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." The Court based that holding on the fact that ERISA contains "a comprehensive civil enforcement scheme" that would be undermined if claimants "were free to obtain remedies under state law that Congress rejected in ERISA" (slip op. 12). Under *Pilot Life*, it is clear that the two discharged bank vice presidents would not be able to pursue any civil remedies provided by Massachusetts law.

While the Massachusetts law at issue is a criminal statute, there can be no doubt that it is, in practice, primarily an avenue by which discharged employees may obtain unpaid wages and benefits. The

Massachusetts Supreme Judicial Court stated that "the statute as applied represents an attempt by the State to enforce the provisions of the [bank's vacation] plan" (Pet. App. A23). It reiterated that "'the state is attempting directly to regulate the terms and conditions of a [welfare benefit] plan by using its criminal law to obtain compliance with those terms and conditions'" (*id.* at A26 (quoting *Cairy*, 192 Cal. App. 3d at 843, 237 Cal. Rptr. at 717)). Congress provided no criminal penalties in ERISA for mere failure to pay benefits,[16] and petitioner's attempt to impose such penalties through a statute specifically directed at unpaid wages and benefits conflicts with ERISA's carefully balanced civil enforcement scheme as much, if not more, than did the attempt by the plaintiff in *Pilot Life* to obtain punitive damages under state common law (see slip op. 2, 7-8).[17]

---

[16] Congress provided, in Section 501, 29 U.S.C. 1131, criminal penalties for willful violations of ERISA's reporting and disclosure provisions. It also provided criminal penalties in Section 511, 29 U.S.C. 1141, for certain coercive interferences with statutory or plan rights of participants and beneficiaries. Its provision of criminal penalties for such violations, but not for mere failure to pay benefits, supports the conclusion that it did not think that criminal penalties are appropriate in routine benefits claims disputes, but that the comprehensive civil penalties it provided in Section 502 are adequate to assist claimants in obtaining benefits due them. Accordingly, it would be contrary to Congress's intent to supplement the remedies available in cases involving claims for benefits with state law criminal actions.

[17] In *Kanne* v. *Connecticut General Life Ins. Co.*, No. 85-5642 (9th Cir. Oct. 4, 1988), the court recognized, following *Pilot Life*, that a law that fell into one of ERISA's exceptions for laws regulating insurance (slip op. 12500)) is nevertheless preempted if it "supplement[s] the ERISA civil enforcement provisions available to remedy improper claims

In addition, by requiring employers to pay vacation benefits immediately upon discharge, the Massachusetts statute conflicts with ERISA's regulation governing claims procedures. The regulation, which is authorized by 29 U.S.C. 1133, provides that employers must establish claims procedures, states that claims for benefits must be granted or denied within a reasonable time, and specifically provides that a period in excess of 90 days is generally unreasonable, although it allows for a further 90-day extension (29 C.F.R. 2560.503-1(e)(3)). Thus, under the regulation, and in contrast to the requirement of the Massachusetts statute that benefits be paid immediately, employers may have as long as 90 days or more to determine whether vacation benefits are due.

Finally, as this Court recognized in *Fort Halifax* (slip op. 6), the main purpose of ERISA's broad preemption provision is to eliminate the threat of conflicting and inconsistent state and local regulation, and laws such as the Massachusetts statute at issue impose differing, and sometimes inconsistent, requirements to govern the procedures for paying wages or benefits. For example, states sometimes vary the time of payment according to the occupation of the employee (see, *e.g.*, Ill. Rev. Stat. ch. 48, para. 39m-4 (1987)) or according to whether the employee is still employed, quit work, or was fired (see, *e.g.*, Mich. Comp. Laws §§ 408.472, 408.475 (1985); Wis. Stat. § 109.03 (1988)). States also impose their own recordkeeping and posting requirements (*e.g.*, Del. Code Ann. tit. 19, § 1108 (1985); N.H. Rev. Stat. Ann. § 275.49 (1987)), and sometimes more substantive obligations (see, *e.g.*, Cal. Lab. Code § 203.5 (West 1971 & 1988 Supp.) (bonding requirements to assure payment under certain state contracts); Okla. Stat. tit. 40, § 165.6 (1986) (liability of contractor for wages of a subcontractor's employees). State laws such as these, if applied to employee benefit plans, would effectively defeat ERISA's goal of allowing employers to meet their many ERISA obligations by establishing a uniform administrative scheme to guide claims processing and the disbursement of benefits. The result of such a patchwork scheme of regulation would be inefficient operation of benefit programs, "which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them" (*Fort Halifax*, slip op. 8).

---

processing" (*id.* at 12501). Thus, even if the Massachusetts statute at issue were a "generally applicable" state law, it would nevertheless be preempted by ERISA's enforcement provisions.

CONCLUSION

The judgment of the Massachusetts Supreme Court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

GEORGE R. SALEM
Solicitor of Labor

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

BETTE J. BRIGGS
EDWARD D. SIEGER
Attorneys
Department of Labor

NOVEMBER 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60777

No. 88-32

IN THE

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

against

RICHARD N. MORASH,

Respondent.

On Appeal from the Supreme Judicial Court of the State of Massachusetts

BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF PETITIONER, THE COMMONWEALTH OF MASSACHUSETTS

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Amici Curiae
120 Broadway—3rd Floor
New York, New York 10271
(212) 341-2685

O. PETER SHERWOOD
Solicitor General
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

JANE LAUER BARKER
Assistant Attorney General in Charge of Labor Bureau

M. PATRICIA SMITH
JENNIFER S. BRAND
Assistant Attorneys General
Of Counsel

Amici Curiae States

Alaska

Grace Berg Schaible
Attorney General
P.O. Box K—State Capitol
Juneau, Alaska 99811-0300

California

John K. Van De Kamp
Attorney General
350 McAllister Street
Room 6000
San Francisco, California 94102

Connecticut

John J. Kelly
Chief State's Attorney
P.O. Box 5000
Wallingsford, Connecticut 06492

Illinois

Neil F. Hartigan
Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

Maine

James E. Tierney
Attorney General
Statehouse
Station 6
Augusta, Maine 04333

Maryland

J. Joseph Curran, Jr.
Attorney General

and

Henry Koellein, Jr.
Commissioner of Labor & Industry
Department of Licensing & Regulation
501 St. Paul Place—4th Floor
Baltimore, Maryland 21202

Minnesota

Hubert H. Humphrey, III
Attorney General
State of Minnesota
Suite 200
520 Lafayette Road
St. Paul, Minnesota 55155

New Hampshire

Stephen E. Merrill
Attorney General
25 Capitol Street
Concord, New Hampshire 03301-6397

New Jersey

W. Cary Edwards
Attorney General
Richard J. Hughes Justice Complex
CN080
Trenton, New Jersey 08625

New York

Robert Abrams
Attorney General
120 Broadway
New York, New York 10271

North Carolina

Lacy H. Thornburg
Attorney General
P.O. Box 629
Raleigh, North Carolina 27602-0629

and

John C. Brooks
Commissioner of Labor
4 West Edenton Street
Raleigh, North Carolina 27601

North Dakota

Nicholas Spaeth
Attorney General
State Capitol
Bismark, North Dakota 58505

Oklahoma

Robert H. Henry
Attorney General
Room 112
State Capitol
Oklahoma City, Oklahoma 73105

Oregon

Dave Frohnmayer
Attorney General
100 Justice Building
Salem, Oregon 97310

Pennsylvania

Leroy S. Zimmerman
Attorney General
Strawberry Square—16th Floor
Harrisburg, Pennsylvania 17120

Texas

Jim Mattox
Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Vermont

Jeffrey L. Amestoy
Attorney General
109 State Street
Montpelier, Vermont 05602

Virginia

Mary Sue Terry
Attorney General
101 N. 8th Street
5th Floor
Richmond, Virginia 23219

Wisconsin

Donald J. Hanaway
Attorney General
114 East, State Capitol
P.O. Box 7857
Madison, Wisconsin 53707-7857

Wyoming

Joseph B. Meyer
Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-32

IN THE

Supreme Court of the United States

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

against

RICHARD N. MORASH,
Respondent.

On Appeal from the Supreme Judicial Court of the State of Massachusetts

BRIEF OF *AMICI CURIAE* STATE OF NEW YORK, *ET AL.* IN SUPPORT OF PETITIONER, THE COMMONWEALTH OF MASSACHUSETTS

Statement of Interest of *Amici Curiae*

This brief is filed on behalf of 20 states as *amici curiae*, pursuant to Rules 36.1 and 36.4 of the Supreme Court Rules, in support of the brief filed by petitioner Commonwealth of Massachusetts.

The issues raised by this appeal are of critical importance to all states, including New York and the 19 other *amici curiae* joining in this brief. The Supreme Judicial Court

of the Commonwealth of Massachusetts held in this case that the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, bars a state from criminally prosecuting an employer who refuses to honor an agreement to pay wages to a worker for earned but unused vacation time when the employment relationship is terminated.

Civil and criminal wage and hour enforcement, including vacation pay regulation, is part of the traditional state role in protecting citizens in the field of labor relations. In New York and the other *amici curiae* states, state governments actively assist their citizens in recovering unpaid wages either through a wage payment statute or common law contract rights. Many of the statutes either explicitly include vacation payments or have been interpreted to apply to them. In addition, New York and many of the *amici curiae* states such as the Commonwealth of Massachusetts, impose criminal penalties for the failure to pay agreed-upon wages including vacation wages. ERISA preemption of these laws would dramatically reduce the protection that workers now receive because federal law and enforcement mechanisms do not provide sufficient remedies for workers who are wrongfully denied vacation pay. The *amici curiae* submit this brief because of their interest in retaining the ability to protect workers from abusive employment practices. Because of our substantial involvement in the enforcement of these rights, *amici curiae* have an important perspective to add to the discussion of this case.

Summary of Argument

Payment for earned but unused vacation time upon termination of the employment relationship is not an ERISA benefit plan. This type of vacation pay is not meaningfully different from any other type of vacation pay and thus is a "payroll practice" exempt from ERISA preemption by a Department of Labor regulation. Accordingly, the decision of the Massachusetts Supreme Judicial Court which held that the State of Massachusetts was preempted from enforcing an employer's obligation to pay earned but unused vacation time should be reversed.

Furthermore, Massachusetts General Law c. 149 § 148 is a "generally applicable criminal law" excluded from ERISA preemption. This interpretation is consistent with ERISA's legislative history, the general policy against federal interference in state criminal matters, and the meaning of "generally applicable" law in analogous contexts. Where a state law, like the Massachusetts statute in this case, does not solely govern ERISA-covered areas but applies generally to many different areas, it is generally applicable. Thus, Massachusetts is not preempted from enforcing its criminal wage collection statute.

ARGUMENT

POINT I

PAYMENT OF WAGES FOR EARNED BUT UNUSED VACATION TIME UPON TERMINATION OF THE EMPLOYMENT RELATIONSHIP IS NOT AN ERISA BENEFIT PLAN AND THEREFORE MASSACHUSETTS GENERAL LAW c. 149 § 148 IS NOT PREEMPTED BY ERISA

Amici curiae urge the Court to reverse the decision of the Massachusetts Supreme Judicial Court because the payment, at the termination of an employment relationship, of earned but unused vacation pay, whether paid in a lump sum or otherwise, is no different than payment of wages while an employee is on vacation leave. Since the payment of wages to employees is not governed by ERISA, an employer's payment of vacation pay is likewise not covered by ERISA. Thus, the decision of the Supreme Judicial Court of Massachusetts which reasoned that, because the vacation pay due in this case was to be paid in a lump sum at the end of employment, it was more like severance pay than payment of wages while on vacation leave and therefore was an employee welfare benefit plan covered by ERISA, is erroneous.

In addition, the decision of the Massachusetts Supreme Judicial Court, if affirmed, would create a fractured system of regulation of vacation wages. Wages for earned but unused vacation time paid in a lump sum at the termination of employment would be subject to federal regulation while wages paid when an employee is on vacation leave, either during the course of employment or at the termination of employment, would be subject to state regulation. The extensive system of state enforcement on behalf of citizens

who have been denied vacation pay would be preempted with no corresponding federal enforcement to take its place.

Most workers in America receive some form of paid vacation. In many instances, employers pay vacation wages either during the year when the worker takes vacation or at the end of the year as payment in lieu of vacation. Some employers pay employees who are going on vacation in a lump sum check for all of their vacation time. Many employers also pay wages to employees for earned but unused vacation time at the termination of employment. Some employers pay departing employees their vacation wages in a lump sum while others pay the wages periodically by keeping departing employees on their regular payroll until their vacation days have run out.

The Department of Labor has, by regulation, 29 C.F.R. § 2510.3-1 (1987), interpreted ERISA as not applying to certain payroll practices, including the payment of vacation pay, which although related to employee benefits, are more closely associated with normal wages. The Department has taken the position that "the payment of normal compensation out of general assets while the employee performs no duties does not usually constitute a welfare benefit plan." 40 Fed. Reg. 34,526 (Aug. 15, 1975). The regulation specifically excludes from ERISA coverage "[p]ayment of compensation while an employee is on vacation or absent on a holiday." 29 C.F.R. § 2510.3-1(b)(3)(1987).[1]

1. "[V]acation benefits" as defined and included in ERISA, 29 U.S.C. § 1002(1), apply to pooled vacation benefit plans in industries such as construction where employees work for several different employers during the year and a vacation trust fund is established out of which vacation payments are made. *See Note, Unfunded Vacation Benefits, Determining the Scope of ERISA,* 87 Colum. Law Rev. 1702, 1703 n.12 (1987). The only time this Court has interpreted this term has been in such a case. *Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 463 U.S. 1 (1983).

ERISA expressly authorizes the Secretary of Labor "to prescribe such regulations as he finds necessary or appropriate to carry out the provisions" of the statute. 29 U.S.C. § 1135 (1982). Where Congress has "explicitly delegated authority to construe the statute by regulation, . . . [this Court] . . . must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious or plainly contrary to the statute." *United States* v. *Morton*, 467 U.S. 822, 834 (1984). Excluding vacation pay from ERISA coverage is a reasonable construction of the statute because, as the Department of Labor has reasoned, "paid vacations . . . are associated with regular wages or salary, rather than benefits . . . Moreover, the abuses which created the impetus for the reforms in Title I [of ERISA] were not in this area." 40 Fed. Reg. 24,642-43 (June 9, 1975).

Payment of wages for earned but unused vacation given in a lump sum at the end of employment cannot be meaningfully distinguished from the payment of wages while an employee is on vacation leave either during the course of or at the end of employment.[2] Giving unused vacation wages in one check at the termination of employment rather than during employment does not suddenly change a payroll practice into a welfare benefit plan.

The only difference between vacation wages paid during the course of employment and unused vacation pay given at the termination of employment is that in the latter situation the employment relationship is about to end or

2. The practice of keeping a departing employee on the payroll until their vacation days run out and thus paying vacation wages periodically instead of in a lump sum would fall squarely within the scope of 29 C.F.R. § 2510.3-1 (1987).

has just ended. Otherwise, they are identical in form and substance. Both are earned and calculated according to an employer's vacation policy and are paid out of the employer's general assets. Both represent pay for time when the employee is not actually working. Calculating the unused vacation time of a departing employee requires the same records and procedures as calculating the accrued vacation of an employee still on staff.

The one difference between the two forms of vacation pay—that the employment relationship is about to end or has just ended—is not a meaningful distinction. Employees often receive payment for wages earned during employment after they leave employment. For example, employees who leave employment in the middle of a pay period will often not receive the wages due them until the next pay date. Employers, such as the State of New York, which operate on a "lag" payroll[3] will not pay wages due for the last payroll period worked until one payroll period after the employee has been terminated.

Furthermore, the fact that unused vacation pay is often given in a lump sum check at the termination of employment is irrelevant because many employers also give lump sum vacation checks to employees still on staff who are about to go on vacation. Similarly, some employers who operate on a lag payroll pay departing employees all of their earned wages in a lump sum at the end of the payroll period during which they leave. There is no reason to treat payment for

3. A "lag" payroll is one where wages paid at the end of a payroll period are not for that payroll period but for the preceding payroll period. Thus, if the employee leaves during a payroll period he or she would be entitled to a check at the end of that payroll period and a check at the end of the next payroll period.

unused vacation time any differently than these other payroll practices which occur both during the employment relationship and when that relationship ends.

Conversely, payment for unused vacation pay when an employee leaves employment is, contrary to the holding of the Massachusetts Supreme Judicial Court, very different from severance pay. Unlike an employer who undertakes to provide severance benefits, an employer who pays earned but unused vacation wages is not required to develop a new or different set of administrative procedures. The records and procedures used to determine whether a departing employee is entitled to vacation wages and the amount due are the same records and procedures that are used when an employee is absent on vacation leave during the course of employment. The need for planning to meet a periodic demand for adequate funds to pay unused vacation pay is no different from the need to plan to pay lump sum vacation wages to employees who go on vacation leave during the course of employment.

Moreover, severance pay is an entirely different type of benefit, in the nature of an unemployment benefit, that occurs because of the specific event of termination and is paid upon termination. By contrast, an employee is entitled to claim unused vacation pay before termination and usually does claim it during the employment relationship. Unused vacation wages are not a separate benefit but merely represent payment for time worked for which an employee has not yet been compensated.

Because payment for unused vacation time at the termination of employment is so similar to other types of vaca-

tion pay, ERISA preemption of state enforcement in this area would result in a fractured system of regulation and enforcement of vacation pay. Preemption would split the regulation of vacation wages between federal and state jurisdictions, thus possibly subjecting each employer's vacation pay policy to both state and federal regulation. An employer's vacation pay policy would be subject to state regulation when employees were returning from vacation leave, but the same vacation policy would be subject to federal regulation when an employee was departing.

In addition, employers who provide lump sum vacation payments to employees who have resigned or been fired would be subject to federal regulation, but employers who keep departing employees on the regular payroll until their vacation days have expired would be subject to state regulation. These two situations involve the same wages, yet they would be subject to completely different regulation. Such a split system is subject to abuse; employers wishing to evade enforcement could tailor their payment for earned but unused vacation time to fall under either state or federal regulation depending on which is less strictly enforced in a particular state.

ERISA preemption of accrued vacation pay would also drastically reduce the protection that workers now have against employers who fail to pay them vacation wages. The extensive system of state regulation and enforcement in this area, both criminal and civil, would be replaced by what one commentator has called, a "regulatory vacuum." *Note, Unfunded Vacation Benefits, supra* note 1 at 1703.

In addition to Massachusetts, at least forty-six states and the District of Columbia have wage payment statutes.

Over half of the statutes in these states explicitly include, or have been interpreted to include, vacation wages.[4] In many states, these statutes have existed in some form for nearly one hundred years.[5]

Most states also provide an administrative mechanism to assist citizens in recovering unpaid wages. For example, the New York State Department of Labor, Division of Labor Standards ("Division"), employs approximately 90 investigators to pursue complaints of employer failures to pay wages including vacation wages within the state. The Division maintains eleven district and sub-district offices throughout the state to receive such complaints. In 1987, the Division collected over $4 million on behalf of citizens,

4. These states are: Arizona, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, West Virginia, and Wisconsin.

5. In New York, for example, Labor Law § 198-a and § 198-c make it a misdemeanor for an employer to fail to pay agreed-upon wages or vacation pay. This statute has existed in some form since at least 1909. Labor Law § 198-a, Historical Note (McKinney 1986). Indeed, as early as 1910, a provision requiring railroad companies to pay their workers in cash semi-monthly and making it a misdemeanor to fail to do so, survived a constitutional challenge in the New York Court of Appeals and was found to be a valid exercise of a state's police powers. *The New York Central and Hudson River Railroad Co.* v. *John Williams, Commissioner of Labor*, 199 N.Y. 108, 92 N.E. 404 (1910).

Similarly, Massachusetts Gen. Law c. 149 § 148 has existed in some form since 1879 (see Historical Note, MGLA 1982) and in 1885, the justices of the Supreme Judicial Court found a law requiring manufacturers to pay their employees weekly, a constitutional exercise of state power. *In re House Bill No. 123*, 40 N.E. 713, 163 Mass. 589 (1895). Other state statutes also date from the late nineteenth century. *See, e.g.* Pa. Stat. tit. 43 § 271 (Purdon 1964) (enacted in 1891); Wis. Stat. § 109.03, Historical Note (1988) (existing in some form since 1889).

nearly $2 million of which was for wage supplements, primarily vacation wages.

In contrast to the state regulatory system, ERISA does not provide an administrative mechanism for the collection of benefits, 29 U.S.C. § 1132(a).[6] An employee's only remedy for the non-payment of vacation wages would be to sue in court, no matter how small the claim.[7] However, in most instances, where an employee has been denied accrued vacation pay, the amount of money involved is too small to warrant hiring an attorney and initiating a private lawsuit.[8] Thus, federal preemption of this area would deprive citizens of their only true remedy when they are denied accrued vacation pay.

Accordingly, *amici curiae* urge the Court to reverse the decision of the Massachusetts Supreme Judicial Court. Payment for unused vacation pay at the end of employment is a payroll practice like all other kinds of vacation wage payments. Preemption of enforcement of employer obligations to pay earned but unused vacation pay would create an arbitrary and fractured system of regulation and would

6. The United States Department of Labor, Office of Pension and Welfare Benefit Programs, does employ investigators to investigate complaints under ERISA. Their principal function, however, is to inspect trust fund records to discover mismanagement or fraud in the handling of fund assets by fund trustees, not to assist employees in obtaining earned but unpaid benefits.

7. Federal court would be available in all cases. Thus, as the Court of Appeals for the Seventh Circuit has warned, federal preemption of vacation pay "could bring a host of trivial cases into the federal courts," *National Metalcrafters Division of Keystone* v. *McNeil*, 784 F.2d 817, 823 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 403 (1986).

8. In 1987, the New York State Department of Labor collected $1,736,000 in wage supplements on behalf of 2,327 citizens. Thus, the average claim was for $746.

deprive workers of any meaningful remedy for recovering vacation wages. We urge the Court to preserve state authority in this traditional area of state regulation which is of critical importance to working people.

POINT II

MASSACHUSETTS GENERAL LAW c. 149 § 148 IS A "GENERALLY APPLICABLE CRIMINAL LAW" EXCLUDED FROM ERISA PREEMPTION

By creating an exception to ERISA's broad preemption provision for state criminal laws, Congress acknowledged the fundamental right of states to devise and enforce penal sanctions. Many state laws, including New York State Labor Law § 198-c and Massachusetts General Law c. 149 § 148, criminalize an employer's knowing refusal to pay earned vacation pay to workers. Such laws apply equally to situations in which benefits are covered by ERISA and those that are payroll practices. Since such laws do not solely govern conduct *vis-a-vis* ERISA-covered benefit plans, they are "generally applicable criminal laws" and therefore not preempted by ERISA.

ERISA excludes "generally applicable criminal laws" from its preemption provision but does not specifically define the phrase. As shown by the plain meaning of the provision, its legislative history, this Court's use of the term "generally applicable" in analogous contexts, and the general policy against federal interference in state criminal enforcement, the term "generally applicable," means laws that apply generally rather than exclusively to ERISA-covered areas. Thus, this provision exempts criminal wage

and benefit collection statutes, which apply generally to all manners of payment of benefits by employers, including those not covered by ERISA, from ERISA's preemption provision.

The plain meaning of the term "generally applicable criminal law" is a criminal law which applies generally rather than to "specific instances." The word "generally" is defined as "in a reasonably inclusive manner: in disregard of specific instances and with regard to an overall picture." *Webster's Third New International Dictionary* (1981). In the context of ERISA preemption, "specifically applicable criminal laws" would be laws pertaining specifically to ERISA benefit plans. Criminal wage and benefit collection statutes, on the other hand, cover the "overall picture" of enforcing all types of promised payments to employees rather than the specific area of ERISA plans. Thus, the "plain meaning" of the phrase "generally applicable" demonstrates that such laws are not preempted by ERISA.

This conclusion is supported by the principles applied by this Court that analysis of whether a state law is preempted by ERISA "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Preemption is not presumed unless "the nature of the regulated subject matter permits no other conclusion, or . . . Congress has unmistakably so ordained." *Id.* at 522.

Moreover, federal preemption of state criminal laws is not to be lightly presumed since "[t]he right to formulate

and enforce penal sanctions is an important aspect of the sovereignty retained by the States," *Kelly* v. *Robinson*, 479 U.S. 36 (1986). Exercise of a state's police powers "should be respected unless there is a clear collision with a national law." *Kesler* v. *Department of Public Safety, Financial Responsibility Division, State of Utah*, 369 U.S. 153, 172 (1962).

Mindful of these concerns and respecting the traditional exercise of state police powers in the area of employee rights, Congress devised an exception from ERISA preemption for criminal laws. The exception represents a compromise of its goal in ERISA of consistency in the law governing employee benefit plans in favor of the right of states to devise and implement criminal laws even those which may relate to employee benefit plans. Allowing the states to continue to treat behavior they believe to be so detrimental to the public as to merit criminal sanctions undermines to some degree the goal of consistency. Had Congress believed that perfect consistency in regulation was a paramount goal of ERISA, however, it would have made no exception whatsoever for criminal laws in the preemption provision. *See, generally, Alessi* v. *Raybestos-Manhattan, Inc.* 451 U.S. at 523 n.19 ("The scope of federal concern is, however, limited by ERISA itself"). Thus, while the statute broadly supersedes any and all state laws which may now or hereafter "relate" to any employee benefit plan with its coverage, it explicitly preserves state regulation of "generally applicable criminal law[s] of a State" 29 U.S.C. § 1114(b)(2)(B)(4).

Early drafts of ERISA did not contain as broad a preemption provision as the version which became law. The

Senate version of the bill preempted only state laws which "relate to the subject matters regulated by this Act" and an earlier House version of the bill preempted only laws relating to reporting, disclosure, and fiduciary responsibilities. "Summary of Differences Between the Senate Version and House Version of H.R. 2 to provide for Pension Reform," *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974* at 5282-83 (1976) (*"Legislative History of ERISA"*). Neither of these earlier versions excluded state criminal laws from preemption. The bill which emerged from the conference committee shortly before its passage contained the current broad preemption provision and an exception for state criminal laws.

Congress's rationale for the broadened preemption provision was to eliminate "the threat of conflicting and inconsistent State and local regulation . . . with the narrow exceptions specifically enumerated." Statement of Rep. Dent, Congressional Record, August 20, 1974, *reprinted in* 3 *Legislative History of ERISA* at 4670. In discussing why the conference committee had expanded the preemption provision from the earlier versions, Senator Jacob Javits, a sponsor of the bill, told the Senate that the earlier versions "opened the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." Report of the Committee of Conference, *reprinted in* 3 *Legislative History of ERISA* at 4770-71.

Very little guidance about the meaning of the term "generally applicable criminal laws" is provided by the

legislative history. The joint explanatory statement of the conference committee states, without elaboration, that "the pre-emption provisions will not apply to any criminal law of general application of a State." 3 *Legislative History of ERISA* at 4650. The only reference to the exception which sheds some light on its meaning was made by Senator Javits in his report on the conference committee changes:

> In view of Federal preemption, state laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance program, et cetera, will be superseded.

3 *Legislative History of ERISA* at 4771. In other words, according to Senator Javits, even a state law which imposed criminal penalties on the failure to contribute to an ERISA-covered plan would not be superseded if it was a law of general application.

As the history demonstrates, Congress was concerned with preserving state criminal laws, but was wary of the states' attempting to elude the preemption provision. Senator Javits spoke of how the earlier, less broad, versions of the preemption provision opened the door to "state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 3 *Legislative History of ERISA* at 4770-71. By limiting the exception to "generally applicable" criminal laws, Congress eliminated the risk that states might hastily enact criminal laws aimed specifically and solely at ERISA plans. Congress did not intend, however, to preclude state enforcement of criminal

laws affecting ERISA plans and other areas. Thus, the legislative history of the state criminal law exception supports the conclusion that Congress intended to save from ERISA preemption state laws which criminalize conduct related to ERISA-covered benefit plans as long as the law is not directed solely at ERISA plans. Since the Massachusetts law reaches beyond ERISA plans, the law is not preempted.

This Court has interpreted the phrase "generally applicable law"[9] consistently with this definition in the related field of labor relations where this Court has dealt often with the relationship between the National Labor Relations Act ("NLRA") and state laws "of general applicability." *See, e.g., Farmer* v. *United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290 (1977). The Court has found laws applicable to the employment relationship to be "generally applicable," *New York Telephone Co.* v. *New*

9. Lower courts which have analyzed the phrase "generally applicable criminal law" have split on whether wage collection statutes should be considered generally applicable criminal laws. Some courts have found such statutes to be within the exception because they are penal statutes which apply generally to all employers. *See Upholsterer's International Union Health and Welfare Fund Trustees* v. *Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C.D. Ill. 1986); *National Metalcrafters Division of Keystone* v. *McNeil*, 602 F. Supp. 232 (N.D. Ill. 1985), *rev'd on other grounds*, 784 F.2d 817 (7th Cir. 1986); *Goldstein* v. *Mangano*, 99 Misc. 2d 523, 417 N.Y.S.2d 368 (1978).

Other courts, like the Supreme Judicial Court of Massachusetts in this case, have interpreted the exception to apply only to criminal laws that apply to conduct which could be committed by all citizens rather than just employers. *Sforza* v. *Kenco Construction Contracting*, 674 F. Supp. 1493 (D. Conn. 1986); *Baker* v *Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983); *Trustees of Sheet Metal Workers International Association Production Workers' Welfare Fund* v. *Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983); *Commonwealth* v. *Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981).

York State Department of Labor, 440 U.S. 519 (1979), and has not limited the term's meaning to include only laws that apply to the entire population.

In *New York Telephone*, this Court declared that the New York State unemployment compensation statute which provided unemployment benefits for striking employees, and laws like it, were "state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.'" *Id.* at 540. Thus, in the Court's view, whether the state law is a law of a general application does not depend on whether it affects the entire population or only employers, as in the case of state unemployment compensation laws, as long as it was not "directed specifically" at an area covered by the federal law. In precisely the same way, the Massachusetts law and other criminal wage collection statutes are general laws not aimed specifically at areas covered by ERISA, that protect interests deeply rooted in local feeling.

In the specific area of ERISA preemption, in *Bucyrus-Erie Co.* v. *Department of Industry and Labor*, 599 F.2d 205 (7th Cir. 1979), the Court of Appeals for the Seventh Circuit recognized that the exception for generally applicable criminal laws meant that Congress intended to "preempt criminal statutes limited in application to welfare benefits," but not other criminal laws. *Id.* at 208. The Court called the Wisconsin Fair Employment Act, a civil law, " a statute of general application . . . not specifically designed to regulate an employer's administration of welfare benefit plans. *Id.* at 208. Thus, the Seventh Circuit's interpretation of "generally applicable" is consistent with the one presented here that ERISA preempts only

criminal statutes limited in application to ERISA-covered benefit plans.

Moreover, when Congress has used the term "generally applicable law" in another statute, its meaning has also been consistent with the one presented here. The Federal Bankruptcy Act states that a bankruptcy trustee's powers are subject to generally applicable laws which give other parties an interest in property. 11 U.S.C. § 546(b).[10] The notes contained in the History section following the law in United States Code Service, 11 U.S.C. § 546, state that "[t]he phrase 'generally applicable law' relates to those provisions of applicable law that apply both in bankruptcy cases and outside of bankruptcy cases." Thus, consistent with this interpretation, "generally applicable criminal laws" in the ERISA context are those laws which apply both in ERISA cases and outside of ERISA cases. Massachusetts General Law c. 149 § 148 is such a law.

A generally applicable criminal law is a general law applying to both ERISA preempted areas and non-ERISA preempted areas. The term's usage in other areas of the law and the policy against federal interference in the area of state criminal laws support this view and provide what the legislative history does not, a precise definition of the term. Accordingly, Massachusetts General Law c. 149 § 148, and other criminal wage collection statutes throughout the country are not preempted by ERISA.

10. Section 546 (b) reads, "[t]he rights and powers of a trustee under sections [cites omited] are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection."

Conclusion

For all of the foregoing reasons, this Court should reverse the decision of the Supreme Judicial Court of Massachusetts.

Dated: New York, New York
November 16, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Amici Curiae
120 Broadway—3rd Floor
New York, New York 10271
(212) 341-2685

O. PETER SHERWOOD
Solicitor General
Counsel of Record

LAWRENCE S. KAHN
Deputy Solicitor General

JANE LAUER BARKER
Assistant Attorney General
in Charge of Labor Bureau

M. PATRICIA SMITH
JENNIFER S. BRAND
Assistant Attorneys General
Of Counsel

(8)

No. 88-32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

ROBERT M. WEINBERG
JULIA PENNY CLARK
PATRICIA POLACH
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

8 4 1 P

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-32

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women. The affiliates of AFL-CIO and their members have an interest in the sound interpretation and application of ERISA and in the proper interplay between ERISA and state laws designed to protect the interests of working men and women.

ARGUMENT

Introduction and Summary of Argument

The State of Massachusetts requires, under pain of criminal punishment, that an employer who discharges an employee pay all unpaid wages to that employee on the day of the discharge. The Massachusetts statute states that "[t]he word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." Mass. Gen. L. ch. 149, § 148 (1986).

In this case, Massachusetts claims that an employer violated this State law requirement by failing to pay two discharged employees the full wages due to them for unused vacation days. For present purposes, the parties have stipulated that the employer has agreed orally and/or in writing to make monetary payments to employees in lieu of unused vacation time. The parties have further stipulated that payments for used or unused vacation time are made from the employer's general assets. Petition, Appendix A, p. 9.

The question for this Court is whether enforcement of the Massachusetts statute in this case is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* ("ERISA"). In our view, ERISA has no such preemptive effect.

In simple terms, as we show in this brief, there is no preemption here because ERISA does not in any respect regulate the type of vacation arrangements—more precisely, wage or salary arrangements—at issue in this case: the payment by an employer, out of the employer's general assets, of regular wages or salary to an employee for periods not worked because the employee is on vacation; and, the payment by an employer, out of general assets, of a wage or salary premium to an em-

ployee for periods worked by the employee in lieu of taking a vacation.

Indeed, the Secretary of Labor, acting pursuant to express statutory authorization, promulgated definitive interpretive regulations shortly after the passage of ERISA, making clear that such arrangements are not covered by ERISA. And, from that time forward, the Department of Labor has consistently followed that entirely correct interpretation of the law. The Secretary's interpretive regulations are entitled to controlling weight and are dispositive here.

As we further show, the practical effect of reversing the Secretary's longstanding administrative interpretations would be for the first time to subject the most common vacation arrangements to the wide-ranging requirements applicable to benefit plans covered by ERISA, requirements not intended to—and consequently not well suited to—govern such arrangements. The present administrative rule, which leaves regulation of such arrangements to state law, is consistent with ERISA and effective protection of employee interests.

By the same token, as we show in the final portion of this brief, the Secretary has quite properly recognized that Congress intended to regulate other types of vacation arrangements—most significantly, the provision of monetary "vacation benefits" by multi-employer trust funds—that have the characteristics that prompted the enactment of ERISA. In this latter area, as Congress determined, federal regulation is necessary in order adequately to protect employee interests.

1. ERISA is *not* intended to regulate all aspects of the compensation arrangements between employers and employees. Indeed, the core aspect of most such arrangements—the periodic payment of wages or salary for work performed—is *outside the scope of ERISA*. Rather,

ERISA is intended to cover pension benefit plans and welfare benefit plans established to provide particular employment benefits *in addition* to regular wages or salary.

Congress was concerned that, prior to enactment of ERISA, such plans were being operated without adequate "minimum standards," and that as a result many of these plans were underfunded and unable to pay employees promised and anticipated benefits. ERISA § 2(a), 29 U.S.C. § 1001(a). Congress enacted ERISA in order that "minimum standards be provided assuring the equitable character of such plans and their financial soundness." *Id.* With respect to employee welfare benefit plans, the means chosen by Congress to achieve that result are summarized at the outset of the Act:

> by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. [ERISA § 2(b), 29 U.S.C. § 1001(b).] [1]

In § 3(1) of ERISA, Congress defined in general terms the types of welfare benefit plans that are subject to this regulatory scheme: plans, funds, or programs, maintained by an employer, a union, or both, to the extent the plans, funds or programs are

> for the purpose of providing for [their] participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions). [29 U.S.C. § 1002(1).]

[1] The additional requirements for employee pension benefit plans are separately summarized in ERISA § 2(c), 29 U.S.C. § 1001(c).

Consistent with the objectives of ERISA, this definition does *not* reach normal wage or salary compensation arrangements. But the statute does not in terms answer the general question of where "wage and salary arrangements" end and "welfare benefit plans" begin, or the specific question of into which category vacation arrangements of the type here fit.[2] That question is, however, answered definitively by the interpretive regulations promulgated by the Secretary of Labor shortly after passage of ERISA.

2. In § 505 of ERISA, the Secretary is given broad authority to issue interpretive regulations:

> SEC. 505. Subject to title III and section 109, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical, and trade terms used in such provisions . . . .

Immediately after the passage of ERISA, the Secretary initiated a series of rulemaking proceedings in exercise of this authority. In the preamble to the first set of proposed rules under ERISA, issued on December 4,

[2] As we discuss *infra* at 16-18, some types of vacation arrangements—for example, vacation benefits provided through multiemployer trust funds—are clearly welfare benefit plans within the meaning of ERISA. Indeed, § 3(1) of ERISA expressly refers to employee welfare benefit plans providing "vacation benefits" as within the scope of the Act. That statutory phrase does not answer the question here, however, which is: whether the particular arrangements at issue in this case—payment by an employer out of the employer's general assets of regular salary during vacation periods or of additional salary in lieu of vacation—are "employee welfare benefit plans" or are part of normal pay practices.

1974—two months after passage of the Act—the Secretary set forth his intention to issue subsequent proposed ERISA rules respecting the line to be drawn between wage and salary arrangements and employee welfare benefit plans:

> The Secretary also anticipates issuance of regulations that will make it clear that other programs, including certain employer practices (whether pursuant to a collective bargaining agreement or not) under which employees are paid as a part of their regular compensation directly by the employer and under which no separate fund is established will not subject the employer to any filing or disclosure duties under Title I of the Act. Examples of the employer practices that may receive this treatment are payment of overtime pay, *vacation pay*, shift premiums, Sunday premiums, holiday premiums, jury duty or military duty, make-up pay, and pay while absent on account of illness or excused absences. [40 Fed. Reg. 42,236 (December 4, 1974); emphasis added.]

On June 9, 1975, the Secretary issued a proposed rule that dealt generally with criteria for determining whether a practice or arrangement is an employee benefit plan, on the one hand, or a wage or salary arrangement, on the other hand. 40 Fed. Reg. 24,642 (1975). In this proposed rule, the Secretary specifically addressed the status of vacation arrangements of the type in this case. The proposed rule stated:

> [T]he term 'employee benefit plan' shall not include the following practices and arrangements:
>
> * * * *
>
> (m) *Paid sick and vacation leave.* The payment of normal compensation by an employer out of the employer's general assets to employees on account of specified periods of time during which the employees perform no duties while sick or on vacation. [Proposed rule 2510.03-3(m), 40 Fed. Reg. 24,652-3 (June 9, 1975).]

The Secretary explained:

> Paid sick leave and paid vacations (§ 2510.3-3(m)) are not treated as employee benefit plans because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage. [40 Fed. Reg. 24,642-43 (June 9, 1975).]

On August 15, 1975, the Secretary promulgated the final rule on this issue. In the final version, the Secretary used the heading "payroll practices" to "distinguish[] welfare plans from employer payroll practices which, although related to benefits described in sections 3(1)(A) of the Act and 302(c) of the LMRA, are more closely associated with normal wages and salary." 40 Fed. Reg. 34,526 (August 15, 1975). Two parts of the final rule are particularly relevant here.

First, the rule specifically deals with the practice of paying employees their normal wage or salary while on vacation:

> (b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> * * * *
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—
>
> (i) Payment of compensation while an employee is on vacation or absent on a holi-

day, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons. [40 Fed. Reg. 34,531 (August 15, 1975) (codified at 29 C.F.R. § 2510.3-1(b)(3)(i)).]

The Secretary explained:

> Paragraph (b)(2) and (b)(3) of § 2510.3-1 are designed to deal with payment of compensation out of general assets of the employer during periods of employee absences. Such payment could be construed as an employee benefit when an employee is absent for one of the reasons for which benefits described in sections 3(1) of the Act and 302(c) of the LMRDA are provided. Taken together, paragraphs (b)(2) and (b)(3) illustrate the point that payment of normal compensation out of general assets while the employee performs no duties does not usually constitute a welfare plan. For example, the fact that an employee is not present to perform his duties in order to undergo a physical examination, the cost of which is paid by a medical benefits plan maintained by the employer of the employee, which constitutes an employee welfare benefit plan under section 3(1) of the Act, does not mean that wages paid for the time during the employee's absence for the physical examination constitute an employee welfare benefit plan.
>
> In addition, these paragraphs embody the substance of proposed § 2510.3-3(g) jury duty and court testimony, (l) informal policy on absence, (m), paid sick and vacation leave, and (o) job skill training. In addition, paragraph (b)(3) provides in effect that payment of compensation while an employee is absent for reasons other than physical inability to perform duties or other medical reasons (such as pregnancy, a physical examination or psychiatric treatment) does not constitute a welfare plan. In response to comments, payment of compensation at rates greater or less than normal compensation is permitted. [40 Fed. Reg. 34,526 (August 15, 1975).]

Second, the Secretary addressed the practice of paying employees premium rates for work during certain periods. Thus, the final rule includes in the category of "payroll practices" outside the coverage of the Act:

> (b)(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as—
>
> (i) Overtime pay,
> (ii) Shift premiums,
> (iii) Holiday premiums,
> (iv) Weekend premiums.
>
> [40 Fed. Reg.34,531 (August 15, 1975) (codified at 29 C.F.R. § 2510.3-1(b)(1)).]

The Secretary explained the reasons for excluding this practice from the definition of "employee welfare benefit plan":

> Paragraph (b)(1) of § 2510.3-1 deals with payment of compensation for work performed. Such compensation does not indicate the existence of an employee benefit plan, even if paid at a higher rate than normal on account of unusual circumstances. The regulation lists overtime pay (proposed § 2510.3-3(a)) and shift and holiday premiums (proposed § 2510.3-3(b)) as well as weekend premiums, as examples of such higher rates. (Although overtime pay and shift and weekend premiums do not present even borderline cases of Title I coverage, they have nevertheless been included as examples because of inquiries received by the Department of Labor.) [40 Fed. Reg. 34,526 (August 15, 1975).]

3. The arrangements at issue in this case are clearly covered by the foregoing interpretations in the Secretary's

final rule. For purposes of analysis, those arrangements can be considered in two parts.

First, the employer here has agreed to pay his employees their normal compensation for periods each year during which they are on vacation and accordingly not performing any work. This part of the arrangement is part and parcel of what is inherent in all wage and salary arrangements: the agreement on the employer's part to pay a certain amount of compensation in exchange for a certain amount of work from the employee. Here, the employer has agreed to pay a particular annual salary to compensate employees for working a certain number of weeks, but less than all the weeks, in a year. In the same manner, the employer has agreed to pay the employees a weekly salary for working a certain number of days, but less than all the days, in a week. Such vacation arrangements fall squarely within 29 C.F.R. § 2510.3-1(b)(3), and the Secretary is on sound ground in considering such arrangements to be normal compensation arrangements and not welfare benefit plans.

Second, the employer in this case has agreed that when employees do not take their full vacation, but rather put in more weeks of work during the course of the year than they have contracted to perform, those employees will be entitled to additional salary to compensate them for the additional work. This part of the arrangement is in the nature of a salary premium: for working during a vacation period, an employee in effect receives double the normal rate of pay. As we have seen, the Secretary has expressly determined in his final rule that compensation premiums of this type are not employee welfare benefit plans under ERISA. Thus, the Secretary excluded from the coverage of ERISA the "[p]ayment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances." 29

C.F.R. § 2510.3-1(b)(1). While the examples given in the regulation—including "holiday premiums" and "weekend premiums"—do not expressly include vacation premiums, the latter is covered by the principle stated in the rule and is analytically indistinguishable from the listed examples. If premium pay for working on a weekend or holiday is to be treated as part of the normal compensation arrangements and not as a welfare benefit plan, the same should be true of premium pay for working instead of taking a vacation. *See also*, 29 C.F.R. § 2510.3-1(b)(3)(i) (determining that "payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons" is outside the coverage of ERISA).

4. The line the Secretary has thus drawn between payroll practices that are closely related to normal wages, including vacation arrangements of the type here, and welfare benefit plans is wholly consistent with the protective purposes of ERISA. Indeed, the basic reason for protecting the kind of employee welfare benefits covered by ERISA simply does not apply in the context of premium pay for accrued but untaken vacation leave any more than in the context of wage payments excluded from ERISA coverage.

The class of employee benefits covered by ERISA that are provided directly by an employer, and not by a separate benefit fund, are benefits that may become payable only on the occurrence of a contingency *outside the control of the employee*. Thus, welfare benefits covered by the Act such as major medical coverage or severance pay, are due the employee only if certain contingencies come to pass: hospitalization for the former, unplanned severance for the latter. *See*, 40 Fed. Reg. 24,642 ("Distributions from welfare plans are related to specific contingencies such as severance before normal retirement . . .," "[E]mployee benefit plans [relate to] benefits triggered by contingenices such as hospitalization.") The em-

ployee has no control over whether or when the contingency will occur, and, while the benefit may build up over time, the employee has no means to protect himself against the possibility that his expectation of the benefit will be defeated by the employer when and if the contingency finally occurs. In that context, ERISA functions to protect the employee's expectation by requiring reporting, disclosure and fiduciary obligations with respect to the benefit.

Such concerns are out of place in the context of vacation pay or premium pay for accrued but untaken vacation leave. Like wages, such payments are fixed, due at known times, and do not depend on contingencies outside of the employee's control; the employee may elect either to take vacation leave or "cash out" the accrued vacation payments owed, and the employee can protect himself by so choosing. If the accrued vacation accumulates over time, it is only because the employee has chosen to allow such an accumulation. And, if there is any danger of defeated expectations of vacation pay, it is no different from the danger of defeated expectations of wages for services given—a danger which Congress chose *not* to regulate in ERISA, relying instead on state contract and wage payment laws, such as the one in this case, to protect this aspect of the employer-employee relationship. In simple terms, ERISA does not regulate any aspect of the payment of wages or salary, including the timing of such payment.

5. The interpretations embodied in the Secretary's final rule have remained in force unchanged from the passage of ERISA to the present time. And, the interpretations have been confirmed by a consistent series of Department of Labor opinion letters. *See infra* at 17-18. The Secertary's interpretive regulations are, moreover, as we have seen, soundly based in the language and intent of the Act and are entitled to controlling weight.

As this Court stated in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984):

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [Footnotes omitted.]

Deference to the agency interpretation is particularly warranted where, as here, the interpretation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products v. United States*, 288 U.S. 294, 315 (1933); *see also, Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961); *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

6. If, contrary to the settled authority requiring deference this Court were to reverse the interpretations given in the Secretary's rules and regulations, and con-

sistently confirmed over the years by Department of Labor opinion letters, see *infra* at 17-18, the practical consequences would be profound and anomalous. Vacation arrangements of the type in this case are commonly in use by employers throughout the country in virtually every industry aside from those characterized by intermittent employment. From the passage of ERISA until now, employers have not, in connection with such vacation arrangements, been required to, and have not in fact, complied with the broad-ranging requirements of ERISA that would come into play if those arrangements were deemed employee welfare benefit plans for purposes of ERISA.

Were this Court to reverse the Secretary's interpretations, for garden-variety vacation arrangements of the type in this case employers would have to satisfy the following requirements of ERISA: the reporting and disclosure requirements of Title I, part 1, the fiduciary requirements of Title I, part 4, and the enforcement and claims procedures of Title I, part 5.[3]

---

[3] Under these provisions, an employer with a practice of providing paid vacation leave or pay in lieu of taking vacation would be required to establish and maintain the practice pursuant to a written instrument, ERISA § 402(a)(1). The written instrument would have to provide for a named fiduciary to administer the practice, *id.*, and that fiduciary would be required to comply with the fiduciary duties set forth in ERISA §§ 404-406. Employers would be subject to suit *in federal court* whenever an employee claimed that he or she had been denied a vacation on the terms promised by the employer, ERISA § 502(a)(1)(B) and (e)(1). And, employers would be required to provide in writing specific reasons for the denial of vacation leave requested, with an opportunity for review by the named fiduciary, ERISA § 503(1). Finally, employers would be required to provide "participants" and the Department of Labor with a summary plan description naming the fiduciary, agent for service of process, source of funding and other information, ERISA §§ 101(a), 101(b), 102(a)(1) and 102(b).

Although the Act states that the Secretary may exempt a welfare benefit program from all or part of the reporting and disclosure requirements, Section 104(a)(3) of ERISA, 29 U.S.C. § 1024(a)(3), the only applicable existing exemption is for unfunded welfare plans of fewer than 100 participants. 29 C.F.R. § 2520.104-20(b)(2)(i).

Congress concluded that each of these requirements, enforceable as a matter of federal law, serves an important employee protective purpose in assuring the proper administration of welfare benefit plans. And Congress concluded that, on balance, these federal requirements are *not* warranted in the employer's administration of pay and salary practices funded by the employer's general assets, and that the better course is to leave the regulation of such practices to state law. An inspection of the outline of ERISA's requirements set out in the margin is sufficient, we believe, to show that the Secretary's judgment that ERISA's requirements are not well-suited to the governance of vacation arrangements of the type here and that, as is true with regard to other closely analogous pay practices, state law should govern, is both sound and sensible. Certainly whatever marginal employee gains there may be in altering the Secretary's present understandings and substituting federal regulation for state regulation at this point is dwarfed by the attendant costs and confusions.

7. It follows from the foregoing analysis that there is no preemption by ERISA here. Section 514(a) of ERISA provides for the preemption of state laws "insofar as they may now or hereafter relate to any employee benefit plan." If, as we have argued, the vacation arrangements in this case do not constitute an "employee benefit plan," then the threshold requirement for preemption is not met.

8. For the sake of completeness, we add that the fact, as we have shown, that the vacation arrangements here —regular and premium salary payments out of an employer's general assets—are not employee welfare benefit plans within the meaning of ERISA does *not* mean

that vacation arrangements of all varieties are outside the coverage of ERISA. Indeed, § 3(1) of ERISA *expressly includes* employee welfare benefit plans providing "vacation benefits" as within the scope of the Act. And there are in fact types of vacation arrangements, far different from those here, that have the characteristics of welfare benefit plans intended to be covered by the Act, and that are not simply part and parcel of an employer's normal wage or salary compensation arrangements. In a series of opinion letters, the Secretary has, therefore, delineated the types of vacation arrangements that are covered by ERISA.

The classic example of the vacation arrangements covered by ERISA is the provision of "vacation benefits" through a multi-employer trust fund. In industries where workers commonly work for numerous employers for short periods of time during the course of a year—for example, the construction, longshore, and maritime industries—it is not practicable to have vacation arrangements of the type at issue in this case. In these industries, individual employees typically do not have a continuing relationship with any one employer. The intermittent nature of the employment makes it infeasible for any one, short-term employer to grant a period of paid vacation leave.[4]

---

[4] Congress addressed some of the peculiar problems caused by the nature of short-term employment in the construction industry in the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), and the legislative history of that Act describes the short-term employment pattern in the construction industry and the resulting need for multi-employer vacation benefit funds. S. Rep. No. 1684, 85th Cong., 2d Sess., at 22-24 (1958). The Landrum-Griffin Act addressed that need by amending § 302(c) of the Labor Management Relations Act to authorize the use of trust funds, jointly trusteed by representatives of labor and of management, to provide vacation benefits as well as other types of benefits of similar importance to the construction industry, namely holiday benefits, severance benefits, and apprenticeship or other training programs. *See* 29 U.S.C. § 186(c)(6). Congress borrowed heavily from § 302(c) in deriving the list of benefits—including vacation benefits—that it included in the definition of "employee welfare benefit plan" under ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A).

In response to these realities, unions in such industries have commonly negotiated agreements whereby the employers in the industry contribute to a central trust fund which then provides a monetary "vacation benefit" to covered employees. Such vacation benefit plans do not involve any one employer's leave policy nor any simple continuation of regular salary by an employer. Rather, the contributions that participating employers make to the central fund are based upon each hour worked by covered employees or upon some other collectively bargained formula. See, for example, the plans described in ERISA Advisory Opinions 77-84A and 79-14A. Or, a certain amount of employee wages may be withheld and paid to the central fund. See, for example, ERISA Advisory Opinion 78-7A. Within the central fund separate individual accounts may be maintained for each employee or only one account may be maintained for all employees. See, e.g., Advisory Opinion 77-84A as an example of the former and Advisory Opinion 79-14A as an example of the latter. Eligible employees may receive vacation benefit payments at a certain time each year or upon application at the time of their choice. See, e.g., Advisory Opinion 80-20A as an example of the former and Advisory Opinion 78-7A as an example of the latter. Whatever the particulars, under such schemes vacation benefits are paid by the plan out of fund assets, not from general assets of any one employer.

Typically, the central fund is a trust fund administered jointly by union and employer representatives. See, for example, the funds described in *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F.2d 768, 769 (9th Cir. 1962); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 679 F.2d 1307, 1308 (9th Cir.

1982) *vacated and remanded*, 463 U.S. 1, 103 S. Ct. 2841 (1983). For employees covered by such plans, *the trust fund, not any employer*, is the sole source of vacation benefits.

To meet the objectives of ERISA, such trust funds must be properly managed and fairly administered. The Department of Labor has consistently found such vacation benefit plans to be employee welfare benefit plans within the meaning of ERISA § 3(1), subject to the reporting, disclosure, fiduciary and enforcement requirements of parts 1, 4 and 5 of Title I of that Act, rather than "payroll practices" exempted by 29 C.F.R. § 2510.3-1(b)(3). See, ERISA Advisory Opinion Letters 76-21, 77-84A, 78-7A, 79-4A, 79-14A, 79-18A, 79-89A and 80-20A. In so finding, the Department has consistently distinguished these vacation benefit plans, which pay benefits from funds maintained separately from any one employer's general assets, from the kind of employer payroll practices at issue in this case.

The Department, we submit, has been entirely correct in this regard. All the statutory materials point to the conclusion that Congress intended ERISA to cover these multi-employer vacation benefit trust funds. By the same token, it is highly unlikely that Congress would have imposed such far-reaching regulatory requirements in connection with ordinary single employer vacation arrangements of the type here without any discussion of the matter or any demonstration of a need for regulation.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

ROBERT M. WEINBERG
JULIA PENNY CLARK
PATRICIA POLACH
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390